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No. 89-144

In The

Supreme Court of the United States

October Term, 1989

LOCAL UNION NO. 246, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,

Petitioner,

v.

BICKERSTAFF CLAY PRODUCTS CO., INC. and NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON PETITION FOR LEAVE TO INTERVENE AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR BICKERSTAFF CLAY PRODUCTS COMPANY, INC. IN OPPOSITION

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I.

QUESTIONS PRESENTED

Respondent Bickerstaff Clay Products Company, Inc. ("Bickerstaff") contends that neither question formulated by Petitioner is presented by the lower court's decision.

1. The Eleventh Circuit accepted and conformed to the position of the National Labor Relations Board ("Board") by declining to apply any presumption regarding the extent of union support among replacements for striking employees and by deciding the case by an all-of-the-circumstances analysis. Hence there is no conflict between this decision and the Board on this question.

2. Petitioner's second question is an unfounded effort to characterize the Eleventh Circuit's reliance upon two facts present in this case as the creation of a presumption. Any fair reading of the lower court's decision reveals there is no basis for concluding that any such presumption was relied upon. As stated, the lower court reached its conclusion upon a consideration of all of the existing facts.

II.

LIST OF AFFILIATED COMPANIES

Bickerstaff Clay Products Company, Inc. is a Georgia corporation which has no parent, subsidiaries or affiliates.

III.

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STATEMENT OF THE CASE

In its statement of the case, Petitioner mischaracterizes the decision of the Eleventh Circuit in the following respects:

1. Petitioner incorrectly contends that "the Eleventh Circuit declined to embrace the Board's no-presumption rule." (Pet. 3)

2. Petitioner erroneously states that "the Court focused principally on the significance of the permanent replacement of striking employees." (Pet. 7)

3. Petitioner wrongly contends that the court concluded "the so-called 'Gorman presumption' should apply" under these circumstances. (Pet. 8)

The history of labor relations between Bickerstaff and this Union began in 1965 when the Union petitioned for recognition at three of the manufacturing plants now operated by Bickerstaff in Russell County, Alabama. Although the Union won only one election, the present management of Bickerstaff voluntarily recognized the Union throughout its manufacturing facilities. During the next 20 years the Union and Bickerstaff successfully negotiated successive labor agreements without a work stoppage. (App. 2a).

A change in the relationship between the Union and Bickerstaff's employees began during negotiations for a new labor agreement in the fall of 1985. Although there were a number of bargaining sessions from September until the first week of November, the parties remained drastically apart on economic issues. In an effort to avert a work stoppage, Bickerstaff made its final offer on November 6, 1985. The Union responded by calling the first strike in the history of the relationship between these parties. (App. 3a). The Union and the Company met after

the strike on November 18, 1985, and again on December 9, 1985 to no avail. On December 12, 1985, the chief executive officer of the Company met privately with a long-time representative of the International Union in an effort to break the deadlock. There was one last meeting between the Union and the Company on January 13, 1986. (App. 4a).

Thirty-five percent of the work force refused to participate in the strike from the outset. (App. 3a). By December 12th or 13th a majority of those who had struck abandoned the strike to return to work. A total of 147 of the former striking employees returned to work and, on the date that Bickerstaff withdrew recognition, 133 of the former strikers were at work. (App. 10a).

Shortly after the strike began, the Company advertised for permanent replacements. During the first ten days of the strike 150 new workers had been hired. (App. 9a & 10a). Ninety-three striker replacements were working at the time Bickerstaff withdrew recognition of the Union. (App. 10a). On two occasions during negotiations following the strike, the mediator presented Bickerstaff with the Union's demand that striker replacements be discharged. (App. 10a).

Threats were made against employees who crossed the picket line and they were the targets of numerous incidents of violence and destruction of property. (App. 10a).

Thirty-eight employees either resigned or withdrew from union dues deductions after the strike began on November 11, 1986. (App. 11a).

During the strike the Union's management and leadership deteriorated. The local business manager resigned on December 12, 1985. A succession of four representatives of the International Union were unable to give direction to the management of the local and on January 3, 1986 the local Union was placed under trusteeship and its elected officials dismissed. (App. 11a). On January 23, 1986, Bickerstaff declared an impasse and implemented its final offer. Bickerstaff received no further communication from the Union until its letter of April 8, 1986, three months later. (App. 11a).

Shortly before Bickerstaff withdrew recognition of the Union, it received a letter from the Regional Director of the Board setting out its investigative findings in connection with an unfair labor practice charge filed against the Union by three of Bickerstaff's employees. The Board found that some of the members of the Local were dissatisfied with representation provided them by the Union and that the Union had reneged upon promises to pay strike benefits to the strikers. (App. 12a & 13a). Numerous newspaper stories reported on the workers' disillusionment and dissatisfaction with the Union. One such story, which was verified by the Union representative who testified at the hearing, quoted strikers as predicting " . . . that if Laborers International tries to maintain Local 246, it will find the biggest brick wall at Bickerstaff is between the Union and its estranged members." (App. 13a N.7).

The Eleventh Circuit analyzed the composition of the bargaining unit on the date Bickerstaff withdrew recognition and compared those statistics with the composition of the bargaining unit in *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir. 1978), and

concluded that the evidence of non-support was much more persuasive in *Bickerstaff Clay Products Company, Inc. v. NLRB*, 871 F.2d 980 (1989). (App. 24a & 25a).

Upon consideration of all of the circumstances present in *Bickerstaff*, the Eleventh Circuit concluded that the substantial evidence on the record as a whole did not support the Board's conclusion that the Company unlawfully withdrew recognition. (App. 28a).

SUMMARY OF ARGUMENT

Petitioner has not made the requisite strong showing of justification for failure to request intervention earlier. The Board is vested with policy-making authority in labor matters. It has made the decision not to apply for certiorari in *Bickerstaff*. Its decision in this regard is not subject to judicial review and should not be overridden by the Petitioner in this case.

The petition to intervene should be denied because Petitioner has no standing; the petition is not timely; and the authority cited by Petitioner does not support intervention in this case.

The questions raised by Petitioner are not presented by the Eleventh Circuit's decision in *Bickerstaff*. This court has granted certiorari in *Curtin Matheson*,[1] which is a case in which the issue of whether and to what extent presumptions should be applied regarding the support of striker replacements for an incumbent union. It is neither necessary nor appropriate to grant certiorari in *Bickerstaff* in order to decide this issue.

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[1] *NLRB v. Curtin Matheson Scientific, Inc.*, 57 U.S.L.W. 3835 (88-1685).

The Eleventh Circuit followed the Board's no-presumption, fact-dependent approach to withdrawal of recognition cases. The narrow holding of *Bickerstaff* does not raise an issue significant to national labor policy. Thus the petition for the writ of certiorari to the Eleventh Circuit Court of Appeals should be denied.

ARGUMENT

1. COURT SHOULD DENY PETITION TO INTERVENE

Motions For Intervention Made After Entry Of Final Judgment Are Granted Only On A Strong Showing Of Entitlement And Justification For Failure To Request Intervention Sooner.

See *U.S. v. Blue Chip Stamp Co.*, 272 F. Supp. 432 affirmed sub nom. *Thrifty Shoppers Scrip Co. v. U.S.*, 389 U.S. 580, 88 S.Ct. 693, 19 L.Ed.2d 781 (1968); *U.S. v. Western Electric Co.*, 1968 Trade Cases, ¶72, 415 (D., N.J.) affirmed sub nom. *Clark Walter & Sons, Inc. v. U.S.*, 392 U.S. 659, 88 S.Ct. 2286, 20 L.Ed.2d 1348 (1968); *U.S.A. v. Associated Milk Producers, Inc.*, 534 F.2d 113(2), 116 (CA8, 1976); *NAACP v. State of New York*, 413 U.S. 345, 37 L.Ed.2d 648, (8), 662, 93 S.Ct. 2591 (1973); *Delaware Valley Citizens' Council v. Com. of Pa.*, 674 F.2d 970(7), 974 (CA3, 1982); *McKenna v. Pan American Petroleum Corporation*, 303 F.2d 778 (1,2), 779 (CA5, 1962); *NLRB v. Shurtenda Steaks, Inc.*, 424 F.2d 192 (1,3), 194-195 (CA10, 1970).

The Labor Department through the National Labor Relations Board and its General Counsel, establishes the policies of the United States in labor matters.

When the NLRB elected not to appeal the ruling of the Eleventh Circuit Court of Appeals in *Bickerstaff Clay Products Company, Inc. v. NLRB*, 871 F.2d 980, decided on April 27, 1989, that ruling became the equivalent of the law of this case. The NLRB and its General Counsel make the labor policy of the government and are charged with the responsibility for enforcing its labor laws.

Only the NLRB General Counsel is authorized to issue and prosecute complaints charging unfair labor practices. An issue is not properly before the board unless it is raised by a representative of the General Counsel. *Teamsters, Brewery & Beverage Drivers & Workers Local 67* (1953), 107 NLRB 299.

The General Counsel is within his authority when he refuses to issue a complaint. *Mulroy v. NLRB*, (CA4, 1971) 66 LC ¶12, 141.

Except in the case of an abuse of discretion on the part of the General Counsel, a court has no authority to order him to issue a complaint. *Retail Clerks, Local 954 v. Rothman*, (CA D of C, 1962), 44 LC ¶17, 362, 298 F.2d 330; *Hourihan v. NLRB*, (CA D of C, 1952) 22 L.C. ¶67, 256.

The General Counsel has the final word as to issuing complaints. His refusal to issue a complaint is not subject to Board Review. *Columbia Pictures Corp.* (1949) 85 NLRB 1085; *Times Square Stores Corp.* (1948) 79 NLRB 361; *Lee dba N.W. Photo Engraving Co.* (1953) 106 NLRB 1067.

The refusal of the General Counsel to issue a complaint is an exercise of administrative discretion and is *not* subject to judicial review, either under Declaratory Judgment Act or the Administrative Procedure Act. See the numerous Court of Appeals cases cited in CCH Labor Law Reports ¶5560, 2651, P. 13867.

Finally, in a recent decision, *NLRB v. United Food and Commercial Workers*, 484 U.S. ___, 98 L.Ed.2d 429, 108 S.Ct. ___ [No. 86-594] (1987), this Court held:

> "Prehearing dismissal of unfair labor practice complaint by General Counsel of NLRB pursuant to informal settlement held not subject to judicial review under provisions of National Labor Relations Act or of Administrative Procedure Act." (L.429)

This is a full bench decision (the Chief Justice and Justices Scalia, White and O'Connor concurred in a separate opinion unrelated to the point in the instant case.)

The majority opinion written by Justice Brennan is so thorough, so lucid and so well annotated, that we resist the temptation to quote selected excerpts and simply say that, in the case at bar, the decision of the General Counsel not to petition for certiorari in this Court is not subject to judicial review. The petitions of the Union to intervene and for certiorari must be denied.

Even if it could be said that judicial review is available, the Union should not be permitted to force the NLRB and the General Counsel into a review situation when they do not wish review. However it is broken down or divided, they do determine and enforce the policy of the government in labor matters and they

should not, as a matter policy, be overridden in the case at bar.

For example, as the Union points out (page 12, Section II, of its petition for certiorari) the Court has already granted certiorari on the Board's petition in *NLRB v. Curtin Matheson Scientific, Inc.*, 57 U.S.L.W. 3835 (88-1685). This is a case which, whether or not the " . . . question presented . . . is identical to the first question presented in the case at bar", (L.12), certainly deals with the same subject matter. It should be within the discretion of the Board and the General Counsel to make a decision as to whether or not to petition for certiorari in the case at bar. They might consider it helpful or they might not.

The Union Has No Standing As A Union Representing Bickerstaff Employees.

There is a particular reason in this case as to why the General Counsel and the NLRB, not the Union, should make the decision as to whether or not to seek judicial review of the Eleventh Circuit decision. Whether or not the Union has standing to file a petition for certiorari on behalf of Bickerstaff employees is also a very closely related question decided by the Eleventh Circuit in this case. While the questions are not precisely the same, the evidence presented below as to Bickerstaff's "good faith doubt of (the) union's majority status" raises at least a serious doubt that, in fact, the Union represented a majority of the employees. This evidence is detailed in the Eleventh Circuit opinion (App 9a-14a). These charges were not rebutted by the NLRB and so the factual findings in the Eleventh Circuit opinion are binding. These findings demonstrate that the Union no longer represents

the Bickerstaff employees and, therefore cannot act for them in this case. Even if that is not so, the Union's standing is so tenuous that the decision on seeking judicial review should be made by the General Counsel and/or the Board, not the Union.

The Petition For Leave To Intervene Was Not Timely.

Rule 59(2), F.R.C.P. provides:

> "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

The petition for leave to intervene was a motion to alter or amend the judgment to add a party, the Local Union. It was served on July 26, 1989, 90 days beyond the date of the judgment on April 27, 1989.

The Local Union, As Petitioner Has No Standing To Intervene In The Case.

The Union cites authorities to support its position that it has standing on pages 8-10 of its petition to intervene. They do not support the position of the Union:

> *N.L.R.B. v. Acme Industrial Company,* 384 U.S. 925, 16 L. Ed.2d, 529, 86 S.Ct. 1442 (1966) holds merely that the motion for leave to intervene is granted. In *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 17 L.E2d 495, 87 S.Ct. 565 (1967), the report of the case itself, the issue is not discussed.
>
> *International Union, United Automobile Aerospace and Agricultural Implement Workers of America v. Scofield,* 382 U.S. 205, 15 L.Ed.2d 272, 86 S.Ct. 373 (1965) held that the Union was entitled to intervene in the Court of Appeals although it had been successful before the NLRB.

International Union of Mine, Mill and Smelter Workers v. Eagle-Picher Mining and Smelting Company, 325 U.S. 335, 89 L.Ed. 1649 (1945).

In the last case, the Union was permitted to intervene in the Circuit Court of Appeals in a proceeding instituted by the NLRB. It had standing to review the Court of Appeals order which denied the petition of the Board to reopen an order even though the Board itself elected not to seek review. The Board, although it did not itself apply for certiorari, did appear in support of the petition. In denying the relief sought by the Union, the Supreme Court emphasized the importance of finality of judgments saying:

> "Finality to litigation is an end to be desired as well in proceedings to which an administrative body is a party as in exclusively private litigation. The party adverse to the administrative body is entitled to rely on the conclusiveness of a decree entered by a court to the same extent that other litigants may rely on judgments for or against them."
>
> *Edward G. Budd Manufacturing Co. v. NLRB,* 332 U.S. 840, 922 L.Ed. 412 (1947).

The Petition of the Foreman's Association of America for leave to intervene was granted without discussion and without any indication that intervention was opposed. The Union was not a party in the Court of Appeals.

Eastern Central Motor Carriers Association v. United States of America, 321 U.S. 194, 88 L.Ed. 668 (1944). The party which did not appear in the District Court was permitted to intervene N.6 (p. 199) states:

> "This intervenor did not appear in the District Court, not having notice of the proceedings there until after the argument there."

New York v. Smith, 469 U.S. 864, 83 L.Ed.2d 135, 105 S.Ct. 204, simply denied the petition for the writ of certiorari, without comment on any other aspect of the case.

Pyramid Lake Paiute Tribe of Indiana v. Truckee Carson Irrigation District, et al., 464 U.S. 875, 78 L.Ed.2d 186, 104 S.Ct. 210 (1983), denied a motion for rehearing without alluding to any issue or question.

Hunter v. Ohio ex rel. Miller, 396 U.S. 879, 24 L.Ed.2d 136, 90 S.Ct. 155 (1969) held: "Motion of petitioner for leave to intervene granted", but it denied certiorari. There was no discussion as to either.

Agnes M. Banks, etc., Petitioner v. Chicago Grain Trimmers Association, Inc., et al., 390 U.S. 459, 20 L.Ed.2d 30, 88 S.Ct. 1140, reh. den. 391 U.S. 929, 20 L.Ed.2d 671, 88 S.Ct. 1800 (1968). Intervention was not discussed and, in fact, we were not able to find any reference to it.

2. THE COURT SHOULD DENY THE PETITION FOR CERTIORARI.

This court has granted the National Labor Relations Board's petition for certiorari in *NLRB v. Curtin Matheson Scientific, Inc.*, 57 U.S.L.W. 3835 (No. 88-1685), decision below 859 F.2d 362 (5th Cir. 1988). The Petitioner in this case has copied the question presented in *Curtin Matheson* in an effort to persuade this court to take this case along with *Curtin Matheson*. Petitioner also attempts to improvise a second issue by characterizing certain of the evidentiary factors considered by the court below as an

additional presumption. These are thinly-veiled attempts to latch on to the presumption issue which this court will review in *Curtin Matheson*. Neither question is presented by the circuit court's decision in *Bickerstaff*.

In the 1982 dissenting opinion upon the denial of certiorari in *Pennco, Inc., v. National Labor Relations Board*, 459 U.S. 994, 74 L.Ed.2d 392, 103 S.Ct. 355 (1982), three Justices of this court perceived a need to resolve a conflict among the circuits and between the courts of appeal and the NLRB over "(t)he questions of whether presumptions can properly be used to determine whether a union has the support of striker replacements, and whether replacements should be presumed to oppose the certified union or favor the certified union." (Id.)

At that time three approaches to the problem were being advocated. The Board, without the support of any of the six circuit courts which had considered the question[2], contended that striker replacements should be counted as favoring the certified union in the same ratio as the strikers whom they replaced. The First, Fifth, Eighth and Ninth Circuits seemed to adopt the opposite presumption relying on reasoning taken from the

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[2] *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir.1981); *NLRB v. Windham Community Memorial Hospital*, 577 F.2d 805, 812-13 (2d Cir. 1978); *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir.1978); *National Car Rental System v. NLRB*, 594 F.2d 1203 (8th Cir.1979); *Whisper-Soft Mills v. NLRB*, 754 F.2d 1381, 1387-88 (9th Cir.1984); and *Pennco v. NLRB*, 684 F.2d 340 (6th Cir.1982).

Gorman treatise.[3] The Second and the Sixth Circuits embraced neither presumption and urged the consideration of all the circumstances on a case-by-case approach.

Since then the NLRB has abandoned its former presumption and has adopted a neutral, ad hoc position requiring "further evidence of union non-support by striker replacements in order to count them against the incumbent union." *Buckley Broadcasting Corp. of California d/b/a Station KKHI (Station KKHI)*, 284 NLRB No. 113 (July 27, 1987), application for enforcement pending, 284 NLRB No. 113 (9th Cir. filed March 7, 1988). Thus the only two positions regarding presumptions presently being advocated are the Board's neutral position announced in *Station KKHI* and the Gorman presumption recognized again by the Fifth Circuit in *Curtin Matheson*.

In deciding *Bickerstaff*, the Eleventh Circuit declined to follow the Fifth Circuit's present view and, instead, chose to follow the neutral approach advocated by the NLRB. Because the Eleventh Circuit chose not to indulge a presumption, it cannot be argued that its decision presents the question of whether the NLRB "may refuse to apply any presumption." The rule in the Eleventh Circuit under *Bickerstaff* would be that the NLRB may, indeed should, refuse to apply any presumption regarding striker replacements in withdrawal of recognition cases.

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[3] R. Gorman, Labor Law 112 (1976): "[I]f a new hire agrees to serve as a replacement for a striker (in union parlance, a strike breaker, or worse), it is generally assumed that he does not support the Union and that he ought not to be counted toward a Union majority."

Because the real conflict lies in the tension between the Gorman presumption, recognized in *Curtin Matheson*, and the Board's position in *Station KKHI*, the question can be resolved fully by this court on the writ of certiorari to the Fifth Circuit granted in *Curtin Matheson*. The scope of the *Bickerstaff* decision was narrow and fact-dependent. Thus no purpose would be served by granting certiorari in this case. This conclusion is obvious from the very fact that the NLRB has decided not to apply for certiorari in this case while pursuing the writ in *Curtin Matheson*. Regardless of which course this court chooses to follow in *Curtin Matheson*, the *Bickerstaff* outcome would not be altered. If it is the Gorman presumption, the case for the employer's good faith doubt would be even stronger. The lower court has already evaluated the evidence under a no-presumption, totality-of-the-circumstances analysis, consistent with the Board's approach in *Station KKHI*, and concluded that an objective basis for a good faith doubt existed.

In an apparent effort to persuade this Court that *Bickerstaff* presents the identical question presented by *Curtin Matheson*, Petitioner misrepresents the basis of the Eleventh Circuit's decision:

> The Eleventh Circuit reasoned that *Randle-Eastern* was consistent with *Station KKHI* because the Gorman presumption should apply where 'the union is negotiating for [the striker replacement's] discharge and he crosses a union-sponsored picket line, violent or not, to report to work' ".
>
> (Pet. p. 12 & 13)

Nowhere in the opinion of the lower court is there even a suggestion that the Gorman presumption should be applied under *any* circumstances. To say that the Eleventh Circuit decision applies the Gorman presumption is simply wrong. Petitioner perpetuates this mischaracterization by arguing at page 14 of its petition that "The Eleventh Circuit held the no-presumption rule in *Station KKHI* could be 'reconciled' with the Gorman presumption embraced by the Fifth Circuit in *Randle-Eastern*." To the contrary, the Eleventh Circuit's construction of *Randle-Eastern* is that the former NLRB presumption, of striker replacements favoring the union in the same ratio as the employees they replace, did not apply where there was other objective evidence of union non-support among the replacements. The clear import of the Eleventh Circuit's view is that *Randle-Eastern* was not bottomed upon the Gorman presumption but upon the other "objective evidence" of the union bargaining for the discharge of the replacements and of picket line violence.

> "We decline to read *Randle-Eastern* so broadly as to establish an unqualified rule applicable in every strike situation where replacement workers are hired. The decision in *Randle-Eastern* should be limited to the specific facts of the case. Read more narrowly, *Randle-Eastern* does not conflict with the Board's *Station KKHI* ad hoc approach since the evidence presented by the employer in *Randle-Eastern* is sufficient to satisfy the requirement of *Station KKHI* that the Company present 'some further evidence of union non-support' in order to count replacements as employees whom the company doubts support the Union."
>
> (App. 22a, 23a).

Petitioner apparently believes that the key to the grant of certiorari in this case lies in convincing the court that presumptions were somehow recognized and applied by the Eleventh Circuit. Petitioner characterizes as "presumptions" the fact of bargaining by the union for the discharge of replacements to make room for strikers and the fact that the replacements crossed a union-sponsored picket line, at least for a time, in an atmosphere of violence. The Petitioner fails to cite any authority for its proposition that these are not facts but presumptions. There is no support for this argument. These are objective facts and circumstances, among others also recognized by the Board and the courts, from which an employer may draw the reasonable inference that replacements do not support the striking union.

In the Board's decision in *Curtin Matheson,* it noted that these significant factors were not present.

> The Court in *Randle-Eastern* inferred that the employees did not support the union in light of *inter alia* violence directed against those who crossed the picket line and the union's negotiating position that the strike replacements would have to be discharged to make room for striking employees when the strike was over. *Id.* at 728. We note that *these two circumstances in particular,* as well as others the court relied on, are not present in the instant case. *Curtin Matheson Scientific,* (emphasis supplied). 287 NLRB 35 (1987)

These were two circumstances among many others which formed the totality of the circumstances present in this case.

CONCLUSION

In overturning the Board's decision in *Bickerstaff*, the Eleventh Circuit concluded that "the Board had erroneously looked at each piece of evidence in isolation instead of looking at the totality of factors." (App. 28a) In addition to the circumstances relating to striker replacements, the lower court considered the following factors: the large number of employees who never participated in the strike, the fact that the picket lines had been abandoned, the number of strikers that had returned to their jobs, the violence and threats associated with the strike, the number of employees who had resigned from the union or withdrawn from dues check-off, the resignation of the union business manager and disruption of union leadership during the strike, the inactivity of the union prior to withdrawal of recognition, the employee dissatisfaction and disillusionment with the union reported in newspapers and in the Board's own investigation of an unfair labor practice charge brought against the union by several strikers. The cumulative effect of these factors overwhelmingly meets "the require(ment) of 'some further evidence of union non-support' that an employer's claim of good faith doubt of the union's majority is sufficient to rebut the overall presumption of continuing majority status." *Station KKHI*, 284 NLRB 113.

Rather than "presumptions", these were the facts upon which the Eleventh Circuit relied in concluding that an objective basis for a good faith doubt of majority support for the striking union existed at Bickerstaff Clay Products Company, Inc. As the General Counsel has concluded, this case is neither necessary nor appropriate for

this Court's review of the validity of the Gorman presumption espoused by the Fifth Circuit in *Curtin Matheson*. Bickerstaff respectfully prays that the petitions for intervention and for certiorari be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

LOCAL UNION NO. 246, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, PETITIONER

v.

BICKERSTAFF CLAY PRODUCTS CO., INC., ET AL.

ON PETITIONS FOR LEAVE TO INTERVENE AND FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the employer, unaided by any presumption regarding the extent of union support among replacements for striking employees, sufficiently established a good-faith doubt that the incumbent union enjoyed continued majority status.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 871 F.2d 980. The decision and order of the Board (Pet. App. 30a-54a) are reported at 286 N.L.R.B. No. 27.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1989. The petitions for leave to intervene and for a writ of certiorari were filed on July 26, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Bickerstaff Clay Products Co., Inc., makes and sells brick and tile products. In 1965, Bickerstaff voluntarily recognized petitioner ("the Union") as the bargaining representative for certain of its production and maintenance employees. The parties thereafter negotiated a series of labor agreements. On November 11, 1985, after the parties had failed to consummate a new agreement, the Union commenced an economic strike. Bickerstaff continued its operations during the strike, relying on striker replacements, employees who elected not to join the strike, and "crossover" employees, who crossed the picket line and returned to work prior to the conclusion of the strike. Pet. App. 2a-3a, 30a n.1

On January 23, 1986, Bickerstaff advised the Union that negotiations were at an impasse and that the Company would institute the wages and other benefits proposed in its final offer, set forth on November 6, 1985. The Union did not respond until April 8, 1986. On that date, the Union offered to accept the final offer and return to work. It also asked Bickerstaff for a list of all employees currently working, along with various additional information regarding the working employees. Pet. App. 4a.

The following day, April 9, Bickerstaff declined to execute an agreement with the Union and, ex-

pressing its "serious[] doubt that [the] union represents a majority of [the] employees" (Pet. App. 5a), withdrew recognition from the Union. The Company also refused to furnish the requested information concerning the existing workforce. As of April 9, there were 304 employees at work, of whom 93 were permanent replacements, 133 were crossovers, and 78 were employees who had not struck. Pet. App. 4a-5a, 30a n.1.

2. Acting on charges filed by the Union, the Board held that Bickerstaff's withdrawal of recognition violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1). Pet. App. 30a-54a. The Board agreed with the administrative law judge (ALJ) that "the total evidence presented by [Bickerstaff] is insufficient to rebut the presumption of the continued majority status that the Union enjoyed as the incumbent bargaining representative" (Pet. App. 30a-31a n.2).[1] In reaching that result, the Board, citing its recent decision in *Station KKHI*, 284 N.L.R.B. No. 113 (July 27, 1987), explained that it was "unnecessary to apply any presumption whether the employees who replaced the strikers supported or did not support the Union" (Pet. App. 31a n.2). The Board ordered the Com-

[1] The ALJ rejected the Company's reliance on strike-related violence, finding that it had all occurred at the very beginning of the strike (Pet. App. 44a-45a). The ALJ further found that 38 dues check-off cancellations by employees did not evidence withdrawal of support from the Union, that 15 resignations from the Union did not constitute a "substantial" withdrawal, and that "there was no probative evidence showing that a substantial number of the replacements expressed disinterest in the Union" (*id.* at 46a, 48a). Finally, the ALJ found no evidence that petitioner had abandoned its representative duties (*id.* at 47a).

pany to recognize the Union and to bargain with it on request (*id.* at 50a-51a).

3. The court of appeals denied enforcement, holding that Bickerstaff had established a sufficient good-faith doubt of the Union's majority status (Pet. App. 1a-29a). The court explained that "the substantial number of resignations and dues check-off authorization[] [withdrawals] in the circumstances of this case"—which included picket line violence (*id.* at 17a) and a "breakdown in union leadership, union dormancy, and employee dissatisfaction and disillusionment with the Union" (*id.* at 26a)—provided "an objective basis for believing that a substantial number of returning strikers no longer desired union representation" (*id.* at 16a-17a).

With respect to the striker replacements, the court noted that some circuits "seem to rely on the statement made by one commentator, R. Gorman, *Labor Law* (1970), that 'if a new hire agrees to serve as a replacement for a striker (in union parlance, a strike breaker, or worse), it is generally assumed that he does not support the Union and that he ought not be counted toward a Union majority' " (Pet. App. 19a, quoting R. Gorman, *supra*, at 112). The court refused to apply that presumption (see Pet. App. 21a-22a), however,[2] and looked instead to the

[2] The court criticized the reasoning of the Fifth Circuit's decision in *Curtin Matheson Scientific, Inc.* v. *NLRB*, 859 F.2d 362 (1988), cert. granted, No. 88-1685 (June 26, 1989), in which that court had approved the so-called "Gorman presumption." The court below explained that the Fifth Circuit had erroneously supposed that the Board's no-presumption rule articulated in *Station KKHI* and its prior rule—presuming that replacements support the union in the same ratio as the workers they replace—were operationally the same. To the contrary, the court below noted, the no-presumption rule

particular circumstances of the strike in gauging the sentiments of the striker replacements. In the present case, the court explained, "the Company expressly rejected proposals made by the mediator on behalf of the Union that Bickerstaff's strike replacements be discharged so that striking employees could return to work" (*id.* at 23a). Moreover, the court stated, "the strike replacements had to cross a picket line, at least for a time, in an atmosphere of violence" (*ibid.*). The court concluded that "it is highly unlikely that a replacement worker supports the union if the union is negotiating for his discharge and he crosses a union-supported picket line, violence or not, to report to work each day" (*id.* at 23a-24a). "Under the facts of this case," the court concluded, "the Company was justified in counting the striker replacements as employees whom [*sic*] the Company doubts supports [*sic*] the Union" (*id.* at 24a).

In sum, the court found "a composite showing of objective evidence which is sufficient to establish, clearly and convincingly, that Bickerstaff had a reasonable basis to support a good faith doubt as to the representative status of the Union" (Pet. App. 27a). The court therefore held that the Company did not violate the Act when it withdrew recognition from the Union, failed to furnish the requested information, and refused to execute a contract based on the Company's last offer (*id.* at 29a).

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alters "the nature and amount of evidence" which the employer must adduce, and gives the Board "more flexibility to consider each situation on its own facts" (Pet. App. 22a).

ARGUMENT

Although entitled, on the filing of a timely motion, to intervene as of right in the court of appeals, *International Union, United Automobile Workers, Local 283* v. *Scofield*, 382 U.S. 205, 217-221 (1965), thereby ensuring its standing to petition this Court for review of an adverse decision, petitioner elected not to do so. Moreover, after the court of appeals refused to enforce the Board's order, petitioner chose not to move in that court for intervenor status, either before or after learning that the Board had determined not to seek certiorari. Petitioner now asks this Court to grant it intervenor status, but does not identify the proceeding, if any, that is now pending before this Court and in which it seeks to intervene. In any event, intervention before this Court is granted "[o]nly for the most imperative of reasons" (R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice* 341 (6th ed. 1986)), and petitioner has not advanced such reasons here. The petition for leave to intervene, and, if reached, the petition for a writ of certiorari, should be denied.

1. Pursuant to Section 9 of the National Labor Relations Act, 29 U.S.C. 159, the National Labor Relations Board may certify a particular labor organization as the exclusive bargaining representative for a company's employees. Once the Board has done so, the union "usually is entitled to a conclusive presumption of majority status for one year following the certification." *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 37 (1987). Accord *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 279 n.3 (1972); *Brooks* v. *NLRB*, 348 U.S. 96, 98-99 (1954). See also 29 U.S.C. 159(c)(3). "[A]fter this period, the union is entitled to a

rebuttable presumption of majority support." *Fall River Dyeing*, 482 U.S. at 38; *Burns International*, 406 U.S. at 279 n.3. An employer may rebut that presumption and withdraw recognition from the union by showing either (1) that the union did not in fact enjoy majority status, or (2) that there was a sufficient, objective basis for a reasonable doubt of the union's majority status.[3]

2. In reaching its decision in the present case, the Board, relying on *Station KKHI*, noted that, in evaluating Bickerstaff's claim that it had a good-faith doubt about the Union's majority status, it would make no presumption concerning the union sentiments of the striker replacements hired by the Company (Pet. App. 31a n.2). The lawfulness of the Board's no-presumption rule is presently before the Court in *NLRB* v. *Curtin Matheson Scientific, Inc.*, No. 88-1685.[4] The Fifth Circuit in *Curtin Matheson* rejected the no-presumption rule in favor of the Gorman presumption, according to which striker replacements are presumed to oppose the incumbent union. In our brief in that case, we have argued that this presumption lacks a sufficient empirical basis, disserves bargaining stability, and imposes too high a cost on the exercise of the protected right to strike.

Petitioner contends (Pet. 12-14) that the decision below presents the same question as that at issue in

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[3] See, *e.g.*, *Whisper Soft Mills, Inc.* v. *NLRB*, 754 F.2d 1381, 1387 (9th Cir. 1984); *NLRB* v. *Pennco, Inc.*, 684 F.2d 340, 342 (6th Cir.), cert. denied, 459 U.S. 994 (1982); *NLRB* v. *Windham Comm. Memorial Hosp.*, 577 F.2d 805, 811 (2d Cir. 1978); *Retired Persons Pharmacy* v. *NLRB*, 519 F.2d 486, 489 (2d Cir. 1975). Cf. *Fall River Dyeing*, 482 U.S. at 41 n.8.

[4] We have furnished a copy of our brief in *Curtin Matheson* to petitioner's counsel.

Curtin Matheson. That is not so. The court of appeals in this case did not apply the Gorman presumption. Rather, looking to the record as a whole —including the Union's conduct of the picket line, and its determination to oust the striker replacements as part of its proposed back-to-work agreement—the court concluded that "[u]nder the facts of this case * * * the Company was justified in counting the striker replacements as employees whom [*sic*] the Company doubts supports [*sic*] the Union" (Pet. App. 24a).[5] Although the Board disagrees with the court's assessment of the evidence, that disagreement raises only a fact-bound issue that does not warrant review by this Court.

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[5] Contrary to petitioner's contention (Pet. 12-13), the fact that both the court below and the Fifth Circuit in *Curtin Matheson* relied on the same precedent, *NLRB* v. *Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir. 1978), does not establish that the court below adopted the Gorman presumption. Thus, whereas the *Curtin Matheson* court interpreted *Randle-Eastern* as having adopted that presumption (859 F.2d at 367), the court below, although acknowledging that the *Randle-Eastern* court "did approvingly cite to Professor Gorman's treatise," concluded that the *Randle-Eastern* court's "decision to include permanent replacements as objective evidence of loss of union support was based on the fact that the Union was bargaining for the discharge of striker replacements to make room for the strikers," as well as the fact that there was "picket line violence with respect to striker replacements" (Pet. App. 22a). "The decision in *Randle-Eastern*," the court below said, "should be limited to the specific facts of the case" (*id.* at 22a-23a).

CONCLUSION

The petition for leave to intervene, and, if reached by this Court, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Respondents

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Local Union No. 246, Laborers' International Union of North America, AFL-CIO (Union) submits this reply brief in support of its petitions for leave to intervene and for a writ of certiorari in order to address arguments first raised by respondents Bickerstaff Clay Products Co., Inc. (Bickerstaff) and the National Labor Relations Board (NLRB or Board) in their briefs in opposition to the petitions.

1. The NLRB suggests that the petition for leave to intervene is inappropriate because the Union has failed to "identify the proceeding, if any, that is now pending before this Court and in which it seeks to intervene." NLRB Br. in Opp. at 6. In granting other petitioners leave to intervene in order to present petition for writs of certiorari, however, this Court has implicitly acknowledged that under certain circumstances the act of intervention itself may commence a proceeding before this Court.

The arguments against intervention raised by Bickerstaff also lack merit. First, Rules 24 and 59 of the Federal Rules of Civil Procedure do not govern a petition to intervene in this Court. Second, the reviewability of a final order of the NLRB is legally distinct from the reviewability of a prosecutorial decision by the General Counsel of the NLRB. *NLRB v. United Food and Commercial Workers, Local 23*, 484 U.S. 112 (1987). Finally, Bickerstaff's "standing" objection is doubly flawed. First, the Union petitions on its own behalf and not merely in a representative capacity on behalf of its members or the employees in the Bickerstaff bargaining unit. Second, the Court of Appeals decision upholding Bickerstaff's withdrawal of recognition of the Union cannot bar the Union from seeking judicial review of that decision.

2. The principal argument advanced by both the NLRB and Bickerstaff in opposition to the petition is that the decision of the Eleventh Circuit is not worthy of this Court's review because it is fact-bound and applied the Board's "no presumption" rule rather than the so-called "Gorman presumption." That argument is incorrect because the decision below relied in part on a modified version of the Gorman presumption; that decision conflicts with the decisions of other circuits; and the questions presented raise important issues of national labor policy. This case merits review by the Court.

A legal presumption arises where proof of one fact renders the existence of another fact so probable that it is sensible and time saving to assume the truth of the latter fact until its adversary disproves it. McCormick, *Evidence* § 343 (3d ed. 1984) (McCormick). *See generally Buckley Broadcasting Corp. of California d/b/a Station KKHI (Station KKHI)*, 284 NLRB No. 113, p. 15 (1987), *application for enforcement pending*, No. 88-7106 (9th Cir. filed March 7, 1988). As petitioner previously showed, the Eleventh Circuit sought to reconcile the former Fifth Circuit's decision in *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir. 1978), with the Board's decision in *Station KKHI* by adopting a modified version of the Gorman presumption.

Thus, the Court of Appeals held that an employer may presume that a replacement does not support the union where "the union is negotiating for his discharge and he crosses a union-sponsored picket line, violent or not, to report to work each day." App. 23a-24a. Bickerstaff explicitly, and the Board implicitly, contend that these circumstances are objective "facts" directly demonstrating non-support for the Union rather than facts leading to that conclusion only if one applies a presumption that that conclusion follows from those facts. However, neither the act of crossing a picket line nor that of working when the incumbent union is bargaining for the striker replacement's post-strike discharge constitutes a manifestation of the replacement's own views on the desirability of continued union representation. Only actions such as an express rejection of union membership or vocal advocacy of non-union status constitute actual evidence of non-support for the Union.

Nor can respondents herein distinguish the Eleventh Circuit's decision below from that of the Fifth Circuit in *Curtin Matheson Scientific, Inc. v. NLRB*, 859 F.2d 362 (5th Cir. 1988), *cert. granted*, 57 U.S.L.W. 3835 (June 26, 1989) (No. 88-1685), on the ground that the former

is "fact-bound" and the latter is not. Each court reached its conclusions that the employer had a reasonable good faith doubt as to the union's continuing majority status through an analysis predicated on both actual facts and presumptions. In *Curtin Matheson* the Fifth Circuit relied on both the Gorman presumption and specific information about actual employee views obtained by the employer's director of employee relations in conversations with non-striking employees, strikers and a striker replacement. *Curtin Matheson Scientific, Inc. v. NLRB*, 859 F.2d at 365-66.

Legal presumptions are created for any of several reasons: where experience has demonstrated that the inherent probabilities are such that the existence of a particular fact is sufficient to prove the existence of a second fact; to correct an imbalance resulting from one party's superior access to the proof; or to vindicate notions of social and economic policy. McCormick § 343. The presumptions embraced below by the Court of Appeals serve none of these purposes; this Court should therefore grant the petitions and reverse that court's decision.

First, no probabilities justify a presumption of union non-support by striker replacements. A person crossing a picket line may do so for any of a host of reasons and cannot be presumed to oppose continued representation by the incumbent union. *Hajoca Corp. v. NLRB*, 872 F.2d 1169, 1174 (3d Cir. 1989); *NLRB v. Pennco, Inc.*, 684 F.2d 340, 342 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982); *Station KKHI*, 284 NLRB No. 113, p. 16. *See also* Brief for the Petitioner, pp. 16-18 (filed Sept. 1989) (NLRB Curtin Matheson Brief) (same), *NLRB v. Curtin Matheson Scientific, Inc.*, No. 88-1685. Because picket lines are so common during strikes, adoption of a presumption that the mere crossing of the line signifies non-support of the striking union would render this presumption virtually coextensive with the Gorman presumption itself. Similarly, the common circumstances that the

striking union bargains for job preferences for strikers over their replacements does not justify a presumption from that fact that the replacements do not support union representation. *Dold Foods, Inc.*, 289 NLRB No. 156 (1988); *Station KKHI*, 284 NLRB No. 113, pp. 15-16.

Second, neither the employer nor the union is more likely to have access to proof of striker replacements' support for continued union representation. Accordingly, this factor (which our research indicates neither the Board nor the courts have considered) does not favor application of such a presumption.

Finally, a presumption of union non-support cannot be reconciled with the fundamental labor policies that underlie the presumption of continued majority support for a union. This Court has repeatedly held that the conclusive presumption of majority support for a union during the year following its certification, and the rebuttable presumption of majority support thereafter, are based on the national policy of promoting industrial peace through stability in collective bargaining relationships without impairing the free choice of employees. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 37-39 (1987); *NLRB v. Financial Institution Employees, Local 1182*, 475 U.S. 192, 202-03, 208-09 (1986). The presumptions embraced below, on the other hand, further industrial conflict and instability in collective bargaining relationships. They also undermine the national labor policy favoring protection of the right to strike. NLRA § 13, 29 U.S.C. § 163; *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 223-34 (1963). *See generally* NLRB Curtin Matheson Brief at 19-27.

Indeed, it is incorrect to permit a party to rebut a legal presumption expressly created to further significant national policies with a contrary presumption that serves no comparable policy. "The doctrine that the weightier presumption prevails should probably be available in any

situation which involves conflicting presumptions, and where one of the presumptions is grounded in a predominant social policy." McCormack § 344.

The Court should grant the petition herein and consider in the case at bar, along with *Curtin Matheson*, whether any presumption may be appropriately applied in determining the views of striker replacements regarding continued union representation.

Respectfully submitted,

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Respondents

PETITION FOR LEAVE TO INTERVENE AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in assessing the reasonableness of an employer's asserted doubt that an incumbent union enjoys continued majority support, the National Labor Relations Board may refuse to apply any presumption regarding the extent of union support among replacements for striking employees.

2. Whether, in assessing the reasonableness of an employer's asserted doubt that an incumbent union enjoys continued majority support, the National Labor Relations Board must presume that replacements for striking employees do not support the union as their bargaining representative where the union is seeking the replacements' discharge and the replacements cross union-sponsored picket lines in order to report to work.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before the National Labor Relations Board were those identified in the caption. The parties to the proceeding before the Court of Appeals were the National Labor Relations Board and Bickerstaff Clay Products Co., Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89- ——

LOCAL UNION NO. 246, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,
Petitioner

v.

BICKERSTAFF CLAY PRODUCTS CO., INC. and NATIONAL LABOR RELATIONS BOARD,
Respondents

PETITION FOR LEAVE TO INTERVENE AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Local Union No. 246, Laborers' International Union of North America, AFL-CIO petitions for leave to intervene and further petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-29a), is reported at 871 F.2d 980. The decision and order of the National Labor Relations Board (App. 30a-54a) are reported at 286 NLRB No. 27.

JURISDICTION

The judgment of the Court of Appeals (App. 1a) was entered on April 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 8(a)(1) and (5) of the National Labor Relations Act (NLRA), 29 U.S.C. §§ 158(a)(1) and (5), provide:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * * *
>
> (5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 159(a) of this title.

Section 7 of the NLRA, 29 U.S.C. § 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

STATEMENT OF THE CASE

At the conclusion of an economic strike by petitioner Local Union No. 246, Laborers' International Union of North America, AFL-CIO (Union), the respondent employer, Bickerstaff Clay Products Co., Inc. (Bickerstaff), claiming a "serious[] doubt" that the Union continued to represent a majority of the bargaining unit employees, withdrew recognition from the Union and declined to sign a successor collective bargaining agreement. The National Labor Relations Board (NLRB or Board) disagreed and issued an order directing Bickerstaff to recog-

nize the Union, execute the collective bargaining agreement and, upon request, bargain with the Union as the employees' exclusive representative. In assessing whether or not Bickerstaff had shown that it had a good faith doubt based on objective considerations that the Union represented the majority of its employees when Bickerstaff withdrew recognition, the Board held that it would apply no presumption regarding whether striker replacements hired by Bickerstaff supported or did not support the Union.

The Court of Appeals denied enforcement to the Board's order. The court declined to embrace the Board's "no-presumption" rule, and instead applied a presumption that striker replacements oppose an incumbent union where the union is bargaining for their discharge to make room for returning strikers, and the striker replacements cross union-sponsored picket lines in order to report to work. Petitioner seeks review of that decision, which presents important and recurring questions on which the circuits are divided, and one of which is identical to the question presented in *National Labor Relations Board v. Curtin Matheson Scientific, Inc.*, 57 U.S.L.W. 3835 (No. 88-1685), *granting cert. to* 859 F.2d 362 (5th Cir. 1988).

1. Respondent Bickerstaff is a manufacturer and vendor of brick and tile products operating four manufacturing plants in Russell County, Alabama. App. 2a. In 1965 the Board certified the Union as the exclusive bargaining representative for the production and maintenance employees in one of Bickerstaff's plants. In 1966 Bickerstaff voluntarily recognized the Union as the exclusive bargaining representative of its production and maintenance employees in its other plants, and the Union and Bickerstaff subsequently entered into a series of collective bargaining agreements. App. 2a-3a.

The most recent such agreement expired by its terms on October 31, 1985, but was extended by mutual agree-

ment to November 10, 1985. App. 3a. Negotiations for a successor agreement began on September 17, 1985 but produced no new agreement. *Ibid.* On November 6, 1985, Bickerstaff made a "final offer" to the Union. The membership of the Union rejected this offer on November 10, 1985, and voted to begin an economic strike the next day. *Ibid.* Of the 304 bargaining unit employees, 195 originally particpiated in the strike. Bickerstaff continued operations with the 109 unit employees who did not strike and immediately began hiring permanent replacements for the striking employees. *Ibid.* The striking employees picketed Bickerstaff's office and each of its four plants. *Ibid.*

Union and Bickerstaff representatives met on four occasions betwen November 18, 1985 and January 13, 1986 but reached no agreement. During these meetings the Union proposed that at the conclusion of the strike Bickerstaff staff the plants with returning strikers in preference to striker replacements. App. 3a-4a. On January 23, 1986, Bickerstaff advised the Union that negotiations were at an impasse and that Bickerstaff was implementing its final offer. App. 4a. On April 8, 1986, the Union informed Bickerstaff that it accepted its final offer, unconditionally offered to have the striking employees return to work, requested that Bickerstaff meet and sign a new agreement containing the terms of the final offer, and requested a listing of all employees currently working along with certain information regarding those employees. App. 4a & n.4.

The next day, April 9, 1986, Bickerstaff notified the Union that it "seriously doubt[ed] that your union represents the majority of our employees" and refused the Union's request for employee information. Bickerstaff further advised that it was withdrawing recognition of the Union, that its final offer was no longer outstanding, and that it would not comply with the Union's request

to sign a collective bargaining agreement. Bickerstaff thereafter refused to bargain with the Union. App. 4a-5a.

As of April 4, 1986, there were 304 working employees, of whom 93 were striker replacements, 133 were strikers who had crossed the picket lines and returned to work, and 78 were employees who had not struck. App. 14a.

2. On April 11, 1986, the Union filed unfair labor practice charges with the Board, alleging violations of sections 8(a)(1) and (5) of the NLRA, 29 U.S.C. § 158(a)(1) and (5), and the Board issued a complaint against Bickerstaff on May 16, 1986. App. 5a. On December 15, 1986, the Administrative Law Judge (ALJ) decided that Bickerstaff violated the Act by its withdrawal of recognition, refusal to execute the agreement, and refusal to furnish the Union with the employee information it had requested. App. 6a.

The ALJ explained that "where the employer and the Union were parties to one or more collective bargaining agreements, it is presumed that the Union continued to serve pursuant to the wishes of a majority of the employees in the bargaining unit. . . . That presumption continues after the collective bargaining agreement expires. . ., and may be rebutted by evidence showing either (1) that the Union actually lost its majority support; or (2) that the employer had a good-faith doubt based on objective considerations of the continued existence of majority support for the Union." App. 39a (citations omitted). The ALJ determined that Bickerstaff made neither showing.

First, the ALJ found that Bickerstaff's final offer remained outstanding at the time of the Union's acceptance of it because the offer had not been explicitly withdrawn and no circumstances had arisen that would lead the parties to reasonably believe that it had been withdrawn. App. 42a. Second, the ALJ rejected Bickerstaff's contention that a presumption arises that new hires and former

strikers who cross the picket line in an atmosphere of violence did not support the Union, finding that there was but a brief period of violent activity at the beginning of the strike in November 1985, and that the record did not show which of the 85 replacements hired before then were among the 93 striker replacements still working on April 4, 1986; a total of 227 striker replacements were hired during the strike. App. 44a-45a. The ALJ found no "probative evidence showing that a substantial number of the replacements expressed disinterest in the Union." App. 48a. Finally, the ALJ rejected Bickerstaff's assertions that there was "disillusionment and dissatisfaction" with the Union and that withdrawals of dues checkoff deductions authorizations and employee expressions of a desire to resign from the Union demonstrated a loss of majority support. App. 45a-46a. The ALJ declined to find a loss of majority in the fact that 15 of 147 returning strikers resigned from the Union. App. 48a. Finally, the ALJ rejected Bickerstaff's contention that the Union had abandoned its representative role, or that a drop-off in picketing activities demonstrated abandonment of the Union. App. 46a.

Bickerstaff filed exceptions to the ALJ's decision with the Board, which affirmed, with modifications, the ALJ's decision and order. App. 30a-31a. The Board found that "the total evidence presented by [Bickerstaff] is insufficient to rebut the presumption of the continued majority status that the Union enjoyed as the incumbent bargaining representative. We find it unnecessary to apply any presumption whether the employees who replaced the strikers supported or did not support the Union." App. 30a n.2. For this proposition the Board cited its decision in *Buckley Broadcasting Corp. of California d/b/a Station KKHI (Station KKHI)*, 284 NLRB 113 (July 27, 1987), *application for enforcement pending*, No. 88-7106 (9th Cir. filed March 7, 1988). *Ibid.* In that case, the Board decided that no presumption regarding the union

adherence of striker replacements should be applied and that the Board should take a case-by-case approach requiring "some further evidence of union non-support" by replacements in evaluating the significance of their numbers to an employer's showing of good-faith doubt of continued majority support for a union. *Ibid.*

In the present case, the Board ordered that Bickerstaff cease and desist from its unlawful behavior; execute the collective bargaining agreement agreed to by the Union on April 8, 1986, and implement the terms of that agreement effective that date; upon request, bargain with the Union; furnish the requested employee information; and post an appropriate notice. App. 50a-52a.

3. Pursuant to NLRA § 10(f), 28 U.S.C. § 160(f), Bickerstaff petitioned the United States Court of Appeals for the Eleventh Circuit to review the Board's order, and the Board, pursuant to NLRA § 10(e), 29 U.S.C. § 160 (e), cross-petitioned the Court of Appeals for enforcement of its order. App. 1a. The Court of Appeals denied enforcement, concluding that Bickerstaff had a reasonable, good-faith doubt that the Union represented the majority of bargaining unit employees when Bickerstaff withdrew recognition. App. 27a-29a.

The court focused principally on the significance of the permanent replacement of striking employees. Reviewing the treatment of this issue by the Fifth [1] and other circuits, as well as by the Board itself, the court asserted that "[a]lthough mere high employee turnover is not normally a sufficient ground to negate a Union's presumed majority status, the permanent replacement of striking employees presents a different situation." App. 17a-18a. The court concluded that, at least where the Union was bargaining for the discharge of striker replacements to

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[1] The decisions of the United States Court of Appeals for the Fifth Circuit prior to September 30, 1981 are binding as precedent in the Eleventh Circuit. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206 (11th Cir. 1981).

make room for returning strikers, and where striker replacements crossed union-sponsored picket lines to report to work each day, the so-called "Gorman presumption" should apply. App. 23a-24a. That presumption, drawn from Professor Gorman's labor law text, asserts that "it is generally assumed that [a replacement] does not support the Union and that he ought not to be counted toward a Union majority." R. Gorman, *Labor Law* 112 (1976). The court determined that the Gorman presumption was consistent with the Board's decision in *Station KKHI*, and held that the under the circumstances of the case, Bickerstaff had presented the requisite "further evidence" of a lack of majority support for the Union. App. 23a.

The court further held that Bickerstaff's good-faith doubt was properly predicated on other factors, including the level of strike participation, the number of returning strikers, the number of employees resigning from the Union or withdrawing from dues checkoff authorizations, and evidence of a breakdown in union leadership, union dormancy, and employee dissatisfaction and disillusionment with the Union. App. 24a-25a.

REASONS FOR GRANTING THE PETITIONS

I. The Court Should Grant the Petition to Intervene

The NLRB has informed petitioner Union that it does not intend to petition this Court for a writ of certiorari in this case. In the proceedings below, the Union was a party to the proceedings before the ALJ and the Board. Because the Union was not a party in this case before the Court of Appeals, however, it petitions this Court to grant it intervention in order to present its petition for a writ of certiorari.[2]

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[2] Petitioner plainly has standing to seek review of the ruling below. *NLRB v. Acme Industrial Company*, 384 U.S. 925 (1966). For, although the NLRA vests in the Board the authority to prose-

On numerous occasions, the Court has also granted leave to intervene in this Court in order to present petitions for writs of certiorari to petitioners who were not parties in the proceedings in the Court of Appeals. *E.g.*, *New York v. Smith*, 469 U.S. 1227 (1985); *Pyramid Lake Paiute Tribe of Indiana v. Truckee-Carson Irrigation*

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cute complaints against employers and unions, and to enforce its orders in the Courts of Appeals, that statute also provides, and this Court has also recognized, that charging and charged parties, who are the real parties of interest in any Board proceeding, enjoy a special role in appellate review of Board cases.

The NLRA provides that in unfair labor practice cases, the General Counsel of the Board has the sole authority to file complaints against charged parties, such as Bickerstaff, and otherwise to seek an adjudication of unfair labor practice charges filed by private parties such as the Union. NLRA §§ 3(d) and 10(b), 29 U.S.C. §§ 153(d), 160(b). The NLRA also authorizes "any person aggrieved" by a decision of the Board to seek review thereof in the Court of Appeals. NLRA § 10(f), 29 U.S.C. § 160(f). The Court has held that successful charging or charged parties before the NLRB may intervene in Court of Appeals review proceedings, *International Union, United Automobile Workers v. Scofield*, 382 U.S. 205 (1965), and may thereafter petition this Court for a writ of certiorari to the Court of Appeals. *Id.* at 208-09; *International Union of Mine, Mill and Smelter Workers, Local No. 15 v. Eagle-Picher Mining and Smelting Company*, 325 U.S. 335, 338-39 (1945). Both the aggrieved person who seeks appellate review and the intervenor on appeal are "parties" within the meaning of 28 U.S.C. § 1254(1), permitting either to petition this Court to issue a writ of certiorari.

The Court has also granted petitions by labor unions to intervene in this Court in Board cases where either the Board or the charged employer filed the petition for a writ of certiorari, *NLRB v. Acme Industrial Company; Edward G. Budd Manufacturing Co. v. NLRB*, 332 U.S. 840 (1947), including where the union was not a party in the Court of Appeals. *NLRB v. Acme Industrial Company; see Acme Industrial Company v. NLRB*, 351 F.2d 258 (7th Cir. 1965), *reversed*, 385 U.S. 432 (1967). *See also Eastern-Central Motor Carriers Association v. United States*, 321 U.S. 194, 199 n.5 (1944) (on appeal from District Court decree, party that did not appear before District Court permitted to intervene in appeal to Supreme Court).

District, 464 U.S. 863 (1983); *Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969); *Banks v. Chicago Grain Trimmers Association*, 390 U.S. 459 (1968).

The leading and most fully articulated decision on this point is *Banks*. In that case, the Court granted both petitioner's motion for leave to intervene and its petition for a writ of certiorari. The petitioner in *Banks* had obtained an award of death benefits under the Longshoremen's and Harbor Workers' Compensation Act as a result of her husband's fatal injury. Her husband's employer brought an action in the United States District Court against the Deputy Commissioner of Labor seeking to set the award aside. The employer lost in the District Court but prevailed on appeal. *Chicago Grain Trimmers Association, Inc. v. R.C. Enos*, 369 F.2d 344 (7th Cir. 1966). Banks was not made a party and did not intervene in either court. The Government declined to petition this Court for a writ of certiorari, and Banks then sought to intervene in this Court in order to file her own petition.

The Court invited the Solicitor General to file a brief expressing the views of the United States. 386 U.S. 1002 (1967). Then-Solicitor General Marshall filed a brief supporting Banks' petition to intervene, stating at pp. 2-3:

> There is a threshold question whether this Court has jurisdiction to grant a writ of certiorari as prayed for in the petition. While it is true that "any party" may file a petition (28 U.S.C. 1254(1)), petitioner was not formally made a party in the proceedings below. She did not seek leave to intervene until after the judgment of the court of appeals was rendered, and the motion to intervene which she then filed was denied by the district court. On the other hand, the procedure whereby the award is defended by the government in the courts is not designed to vindicate any independent governmental interest, but, rather, to remove the burdens of litigation from the shoulders of the compensation claimants, who are rarely individ-

> uals of means. In a practical sense, therefore, the claimant is the real party in interest in the judicial proceedings even if not formally named, and it would not appear unreasonable to deem petitioner a party below for purposes of entitlement to file a petition for a writ of certiorari. [Footnote omitted.]

The Court granted the petitions for intervention and for a writ of certiorari, 389 U.S. 813 (1967), and decided the case on the merits 390 U.S. 459 (1968).

In the present case, petitioner Union stands in much the same posture as petitioner Banks. The agency designated by law to represent its interests in administrative and judicial proceedings has declined to seek review in this Court of an adverse decision by the Court of Appeals. In the proceedings below, the Board acted as the attorney for the Union, in accordance with the statutory scheme. Nonetheless, following the Court of Appeals' refusal to enforce its order, the Board decided not to petition this Court to review that decision. Petitioner Union has an obvious stake in the outcome of this controversy, for its rights and those of its members under the NLRA are squarely at issue. Indeed, had the Board on the merits of this case reached the result embraced by the Court of Appeals, the Union would have been a "party aggrieved" within the meaning of NLRA § 10(f), 29 U.S.C. § 160 (f), and thereby accorded the explicit right to seek review in the Court of Appeals and, if necessary, to file a petition for a writ of certiorari. Petitioner Union had no occasion to petition the Court of Appeals to review the Board's decision in its favor, and the Board represented its interests before that court. Now that the Board has decided to cease its litigative efforts, the Union seeks to intervene in this Court. Petitioner respectfully submits that, consistent with *Scofield*, *Banks* and the other cases cited herein, and in light of the significant issues presented in this case described *infra*, the Court should grant petitioner's motion for leave to intervene for the pur-

pose of petitioning this Court to issue a writ of certiorari to the Eleventh Circuit.

II. The Court Should Grant the Petition for a Writ of Certiorari

On June 26, 1989 the Court granted the petition for a writ of certiorari to the fifth Circuit filed by the NLRB in *NLRB v. Curtin Matheson Scientific, Inc.*, 57 U.S.L.W. 3835 (No. 88-1685), *decision below* 859 F.2d 362 (5th Cir. 1988). The question presented in that case is identical to the first question presented in the case at bar. *See* 57 U.S.L.W. 3835. Because the Court has already decided to review the decision of the Fifth Circuit, petitioner Union herein submits that its petition too should be granted, adopts the NLRB's arguments to this Court for granting the writ to the Fifth Circuit, and will confine its argument herein to the reasons why the Court should review the decision of the Eleventh Circuit as well.

In *Curtin Matheson*, the Fifth Circuit concluded that the Board's no-presumption standard in *Station KKHI* "[o]perationally . . . has the same effect" as the Board's previous presumption that was discarded in *Station KKHI*, namely, "that striker replacements support the union in the same ratio as the employees they replace." 859 F.2d at 367. In its decision below, the Eleventh Circuit correctly noted that, in fact, the two standards differ in the nature and amount of "further evidence of union non-support" required from an employer seeking to demonstrate a good faith doubt that an incumbent union retains its majority status. App. 22a. But in its analysis of the same Fifth Circuit precedent upon which the Fifth Circuit in *Curtin Matheson* relied in rejecting the Board's no-presumption rule in favor of the Gorman presumption, *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir. 1978), the Eleventh Circuit reasoned that *Randle-Eastern* was consistent with *Station KKHI* because the Gorman presumption should

apply where "the union is negotiating for [the striker replacement's] discharge and he crosses a union-sponsored picket line, violent or not, to report to work each day." App. 23a-24a.

The Eleventh Circuit's variation of the Gorman presumption is erroneous and should be reversed by this Court in addressing the questions presented by this petition. Neither of the circumstances cited below provides "further evidence of union non-support" by striker replacements; rather, they are simply presumptions additional to the Gorman presumption itself. As the Second Circuit held in rejecting the Gorman presumption, "many workers might well be pro-Union but might need the job or might reject the use of strikes in [the particular industry]"; "presumptions do not provide [the objective] evidence" necessary to sustain an employer's burden of proof. *NLRB v. Windham Community Memorial Hospital*, 577 F.2d 805, 813 (1978).

With respect to the presumption regarding the effect of union efforts to obtain hiring preferences for strikers, such demands are almost universally made in strike situations, and no more justify a presumption that striker replacements do not support the union than the fact of their employment itself. With respect to the presumption that the mere crossing of a picket line provides "further evidence of union non-support" even under the Board's *Station KKHI* standard, picket lines too are almost universally established in the course of strikes; if that circumstance were to provide the required "further evidence," it would eviscerate rather than satisfy the evidentiary requirement. *See Hajoca Corp. v. NLRB*, 872 F.2d 1169, 1174 (3rd Cir. 1989) ("Workers may cross picket lines as replacements, . . . not out of opposition to unions but due to economic necessities."). *See also NLRB v. Pennco, Inc.*, 684 F.2d 340, 342 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982) (rejecting the employer's sug-

gested presumption that no replacement supports the union "when violence occurs on the picket line").

The Eleventh Circuit's decision below deepens the circuit conflict on these issues. Thus, the Eleventh Circuit, while acknowledging that "the events leading to the withdrawal of recognition in this case are essentially identical to those found in *Curtin Matheson*" App. 27a n.17, formulated a different variation of the Gorman presumption. In doing so, the court erroneously cited as evidentiary matters two factors that simply add further presumptions to the Gorman standard. Because the Courts of Appeals are divided as to whether or not these matters are properly viewed as presumptions or as evidence, and are further divided as to their significance to the ultimate conclusion about an employer's good faith doubt of continued majority status, the Court should grant the petition herein in order to consider this question along with the question presented both in this case and in *Curtin Matheson.*

In dissenting from the Court's denial of certiorari in the *Pennco* case, three Members of the Court, per Justice White, concluded that "the question of whether presumptions can properly be used to determine whether a union has the support of striker replacements, and whether replacements should be presumed to oppose the certified union or favor the certified union . . . are of obvious significance to national labor policy." 459 U.S. 994, 996 (1982). The decision below affords the Court a further appropriate vehicle to resolve the circuit conflicts on these questions. The Eleventh Circuit held that the no-presumption rule established in *Station KKHI* could be "reconciled" with the Gorman presumption embraced by the Fifth Circuit in *Randle-Eastern.* That conclusion is demonstrably incorrect, as is the variation of the Gorman presumption embraced below, and this Court should so decide.

CONCLUSION

The petitions for leave to intervene and for a writ of certiorari should be granted.

Respectfully submitted,

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July 1989

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CERTIFICATE OF SERVICE

I, Caroline McSherry Dolan, hereby certify that three copies of the foregoing Petition for Leave to Intervene and Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit and Appendix thereto were served this 26th day of July, 1989 by United States Postal Service, First Class mail, postage prepaid on the following counsel:

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Sworn and Subscribed to before me
this 26th day of July, 1989.

NOTARY PUBLIC

My Commission Expires: _____

Debra M. Ramos
Notary Public
District Of Columbia
My Commission Expires Sept. 14, 1989

89-144

No. 89-____

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OCTOBER TERM, 1989

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APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 87-7609

BICKERSTAFF CLAY PRODUCTS COMPANY, INC.,
Petitioner, Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent, Cross-Petitioner.

April 27, 1989

Petition for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board (Alabama Case)

Before RONEY, Chief Judge, COX, Circuit Judge, and MORGAN, Senior Circuit Judge.

MORGAN, Senior Circuit Judge:

This case is before the court on the petition of Bickerstaff Clay Products Company, Inc. ("Bickerstaff" or "the Company") for review of an order by the National Labor Relations Board ("NLRB" or "the Board") on September 30, 1987, and the Board's cross-application for enforcement. The Board found that Bickerstaff violated Sections 8(a)(1) and (5) of the National Labor Relations Act ("NLRA" or "the Act"), 29 U.S.C. Sec. 158 (a)(1) and (5), by withdrawing recognition of Laborers'

Local Union No. 246 ("the Union") as the representative of the Company's employees, by failing and refusing to furnish the Union with certain information requested, and by failing and refusing to execute a collective-bargaining agreement found to have been reached on April 8, 1986.[1]

The Board's order requires the Company to cease and desist from these unfair labor practices. As affirmative relief, the order requires the Company to recognize and bargain with the Union, and to furnish the Union with the information it sought concerning the bargaining unit. Additionally, the Board ordered the Company, upon request, to sign a collective-bargaining agreement containing the terms and conditions of employment agreed to between the Company and the Union, and to give retroactive effect to its terms and conditions; or, if no such request is made by the Union, to bargain for a new collective-bargaining agreement and sign any agreement reached. Finally, the order requires the Company to post copies of a remedial notice to employees. We decline to enforce the Board's order.

BACKGROUND

Bickerstaff makes and sells brick and tile products. The Company currently operates four manufacturing plants in Russell County, Alabama.

The history of labor relations between Bickerstaff and the Union began in 1965 when the Union petitioned for recognition as the bargaining representative at three of the Company's manufacturing plants. Separate elections were held at each manufacturing plant. Although the Union won only one election, the present management of Bickerstaff voluntarily recognized the Union as the bargaining representative of the employees in all of the Bickerstaff plants in Russell County, Alabama. Since

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[1] The Board's order is reported at 286 NLRB No. 27 (1987).

1966, the Union and Bickerstaff have successfully negotiated successive labor agreements without a work stoppage until November 11, 1985. The last bargaining agreement between Bickerstaff and the Union which by its terms was to expire on October 31, 1985, was extended by mutual agreement until November 10, 1985. The parties were unable to consummate an agreement, however, and the Union called a strike which began on November 11, 1985.

In September 1985, negotiations commenced to replace the parties' collective-bargaining agreement expiring on October 31, 1985. From September 17, 1985 to the first week of November, Bickerstaff and the Union held ten bargaining sessions prior to the strike. Negotiations were not productive, and on November 6, the Company made a final offer of contract terms.[2] The membership of the Union rejected the offer on November 10, and voted to go on strike the next day at the Company's four brick production facilities. Out of a total collective-bargaining unit of 304 employees, 195 participated in the strike and another 109 did not strike. Beginning on November 11, the Union picketed the Company's Phenix City office and plants.

There were four meetings between union and company representatives after the strike commenced on No-

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[2] Appellant's chief operating officer, President Herbert Fuller, testified that in negotiations before November 6, 1985, the Company and the Union "had been unable to reach an agreement on only a few minor points such as probationary period, bulletin board use, call in pay . . . (but) we were still drastically apart on the economic issues," such as wage increases, increased pensions and insurance contributions and holidays. For instance, Bickerstaff's final offer included an across-the-board hourly wage increase of twenty cents per year for the three-year contract. The Union's final position was an hourly wage increase of forty-five cents per year for the same time period. As found by the Board, Bickerstaff's November 6 final offer covered all of the outstanding issues mentioned by Fuller and, in combination with the other issues previously agreed to by the Company and the Union, constituted a complete contract.

vember 11, 1985. On November 18, union and company negotiators met with a federal mediator, but no progress was made toward agreement on a new contract. The parties met again on December 9, 1985, but to no avail. A private meeting was held on December 12, 1985 between the Company's Chief Executive Officer, Richard Bickerstaff, and a representative of the International Union. The Union and the Company had a final unsuccessful negotiation session on January 13, 1986.

On January 23, 1986, the Company advised the Union that negotiations were at an impasse and that the Company was instituting "wages and other benefits for those working in the plants in accordance with the Company's final proposal which was made on November 6, 1985." [3] The Union did not respond and the Company heard nothing from the Union until April 8, 1986. By letter dated April 8, 1986, the Union informed the Company that it "accepted the final offer made by the Company on November 6, 1985," and offered unconditionally to have the striking employees return to work. In that letter, the Union asked for a listing of all employees currently working along with various matters regarding each working employee.[4] Then, on April 9, 1986, the Company wrote the Union:

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[3] The Company notified the Union by letter dated January 23, 1986, which stated in part:

> The Company is desirous of increasing wages and other benefits for those working in the plants in accordance with the Company's final proposal which was made on November 6, 1985.
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> After due consideration, we have concluded that negotiations are and have been at an impasse and accordingly, the Company will put its final proposal into effect as of January 27, 1986.

Thereafter, the Company effectuated an hourly wage increase of twenty cents and other benefits as proposed in its final offer.

[4] By April 8, 1986 letter, the Union wrote the Company as follows:

> This is to inform you that the Laborers' Local 246, affiliated with the Laborers' International Union of North America,

> This will acknowledge receipt of your letter of April 8, 1986 regarding your union and Bickerstaff Clay Products Company, Inc.
>
> Based upon facts and circumstances which have occurred since the strike at our client's plant, we seriously doubt that your union represents a majority of our employees. Under these circumstances we do not believe that we can recognize your union as the bargaining agent for our employees. Therefore, our last offer is no longer outstanding to your union and your offer to sign a collective bargaining agreement with our client is declined. Furthermore, your request for information about our employees is refused.

Thereafter, the Company refused to bargain with the Union.

The Union filed an unfair labor practices charge with the Board on April 11, 1986, alleging violations of Sections 8(a)(1) and (5) of the NLRA, 29 U.S.C. Sec. 158(a)(1) and (5). The Board issued a complaint against the Company on May 16, 1986. Bickerstaff's

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AFL-CIO, has accepted the final offer made by the Company on November 6, 1985.

It is my understanding that the Company has implemented the terms of that final proposal on January 27, 1986. We will be available to meet and sign the Agreement on Monday, April 21, 1986 if this meets with your schedule....

Additionally, please forward to me a listing of all employees currently working at your Phenix City, Alabama operations. Along with their name, please include the following information: address, phone number, social security number, date of hire, job assignment, rate of pay, marital status, shift, and number of dependents.

By this letter we are offering an unconditional return to work for all striking employees and request you provide me with a listing of all employees you place on the preferential hiring list.

I look forward to seeing you on the 21st of this month.

answer denied any violations of the Act claiming that on the critical date (1) the Union was not representative of a majority of bargaining unit and (2) the Company entertained a reasonable good faith doubt of the Union's majority status. Administrative Law Judge Pargen Robertson ("the ALJ") heard the case on July 16, 1986. In his December 15, 1986 decision, the ALJ rejected the defenses of Bickerstaff and found the Company to be in violation of the Act.

Thereafter, Bickerstaff filed exceptions to the decision with the Board. The issue before the Board was whether there were sufficient objective indications to enable the Company to entertain a reasonable, good faith doubt that the Union represented the majority of its employees at the time the Company withdrew recognition. On September 30, 1987, the Board ruled that it did not and affirmed the ALJ's decision that Bickerstaff violated the Act by withdrawing recognition from the Union on April 9, 1986; by refusing to sign a collective-bargaining agreement with the Union; and by refusing to provide the Union with bargaining unit information. Bickerstaff filed a timely petition in this court to review and set aside the Board's decision. The Board then filed its cross appeal for enforcement. This court has jurisdiction pursuant to 29 U.S.C. Sec. 160(e) and (f).

STANDARD OF REVIEW

In reviewing an order issued by the NLRB, the courts must accept the Board's findings of fact, "if supported by substantial evidence on the record considered as a whole . . ." 29 U.S.C. Sec. 160(e). This general standard of review, however, eludes precise definition. As interpreted by the Supreme Court in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951), "[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Id. at 477, 71 S.Ct. at 459. In searching "the whole record" for substantial evidence, a reviewing court "must take into account whatever in the record fairly detracts" from the Board's fact findings as well as evidence that supports it. *Id.* at 487-88, 71 S.Ct. at 464-65. *See Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1073 (1st Cir.1981). The court is not free to substitute its judgment for that of the Board simply because the court would have made a different choice had the matter been before it *de novo*. *Universal Camera Corp.*, 340 U.S. at 488, 71 S.Ct. at 465. On the other hand, this court is not a "rubber stamp" or the enforcement arm of the NLRB, *Thomas Indus., Inc. v. NLRB*, 687 F.2d 863, 866 (6th Cir.1982), and we must set aside the Board's decision when the court "cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." *Universal Camera Corp.*, 340 U.S. at 488, 71 S.Ct. at 465.

WITHDRAWAL OF RECOGNITION

The Board's decision that the Company violated Sections 8(a)(1) and (5) of the NLRA flowed from its conclusion that Bickerstaff unlawfully withdrew recognition from the Union. The issue before this court is whether substantial evidence exists on the record as a whole to support the Board's decision.

A. The Legal Standards

The broad contours of the law in this area are well settled. Generally, a union that has been certified in a Board-conducted election or voluntarily recognized by an employer is entitled to a continuing presumption of majority status. Absent special circumstances, this presumption is irrebutaable for a one-year period following formal certification or voluntary recognition. *See Ray Brooks v. NLRB*, 348 U.S. 96, 75 S.Ct. 176, 99 L.Ed.

125 (1954). After the expiration of the certification year, the presumption of the Union's continuing majority support continues but becomes rebuttable. *J. Ray McDermott & Co. v. NLRB*, 571 F.2d 850, 859 (5th Cir. 1966); *NLRB v. Gulfmont Hotel*, 362 F.2d 588, 589 (5th Cir.1966). The employer may rebut that presumption, so as to lawfully withdraw recognition of the Union, if it can demonstrate either (1) that the Union actually lost its majority support or (2) that the employer had a good faith doubt based on objective consideration of the continued existence of majority support for the Union. *NLRB v. A.W. Thompson, Inc.*, 449 F.2d 1333, 1336 (5th Cir.1971), *cert. denied*, 405 U.S. 1065, 92 S.Ct. 1497, 31 L.Ed.2d 795 (1972); *NLRB v. Pennco, Inc.*, 684 F.2d 340 (6th Cir.1982).

A good faith doubt of the Union's majority status is a defense to a refusal-to-bargain charge based on the withdrawal of recognition. The employer's good faith doubt must be reasonably grounded and supported by objective considerations and "may not depend solely upon unfounded speculation or a subjective state of mind." *Gulfmont Hotel*, 362 F.2d at 589; *see Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1110 (1st Cir.1981). This is essentially an objective test, although "subjective evidence may be used to bolster the argument that such doubt existed at the relevant time." [5] *NLRB v. Windham Community Memorial Hospital*, 577 F.2d 805, 811 (2d Cir.1978) (quoting *Orion Corp. v. NLRB*, 515 F.2d 81, 85 (7th Cir.1975)). Under this standard, the employer need not conclusively demonstrate that a majority of its employees no longer desire to be represented by the Union. *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir.1978).

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[5] The relevant date to look to in determining the bona fides of the employer's doubts is the date that recognition is withdrawn. *Pennco, Inc.*, 684 F.2d at 342.

Determining whether an employer entertains a good faith doubt of a union's majority status is a question of fact. *NLRB v. Imperial House Condominium, Inc.*, 831 F.2d 999, 1007 (11th Cir. 1987). The burden of proof is on the employer to establish that it had a reasonable, bona fide belief that the Union no longer represented a majority of the bargaining unit employees. *See Allied Industrial Workers Local 289 v. NLRB*, 476 F.2d 868, 881 (D.C.Cir. 1973). Once sufficient evidence has been presented to raise a reasonable doubt as to the continued majority status, the rebuttable presumption is overcome and the burden shifts to the counsel for the Board "to prove that on the critical date, the Union in fact represented a majority of the employees." *Landmark Intern Trucks, Inc. v. NLRB*, 699 F.2d 815 (6th Cir.1983) (quoting *Lodge 1764 and 8743, IAM v. NLRB*, 416 F.2d 809, 812 (D.C.Cir.1969)).

B. Summary of Objective Evidence

The Company asserts that its doubt was arrived at in good faith, based on the following factors: the hiring of permanent replacements; returning strikers crossing the picket line; violence and threats associated with the strike; resignations from the Union and withdrawals of dues deduction authorizations; breakdown in Union leadership; Union inactivity and lack of communication with the Company; employee dissatisfaction and disillusionment with the Union; and, finally, the composition of the bargaining unit on April 9, 1986. A summary of the Company's evidence supporting its good faith doubt as to the Union's majority status is outlined below.

(1) *Replacement of strikers.* Shortly after the strike was called on November 11, 1985, the Company began hiring replacement workers for the strikers. On November 12, the Company placed an advertisement in a local newspaper seeking new employees to replace those who had gone out on strike. Between November 13 and 15,

the Company had hired 85 new employees as replacements for the strikers. During the first ten days of the strike, a total of approximately 150 new workers were hired. By the end of December 1983, Bickerstaff had hired 193 new employees and the Company was again fully staffed. According to the Company's records, a total of 227 replacements had been hired when Bickerstaff withdrew recognition. The record shows that 93 of these replacements were actually working at the close of business on April 4, 1986. Twice during negotiations following the strike, Bickerstaff refused to agree to discharge replacements as proposed by the mediator on behalf of the Union.

(2) *Returning strikers.* Out of approximately 300 bargaining unit employees, 195 initially participated in the strike. The Union representative conceded at the hearing that: "On or about December 12th or 13th, [1985], a majority of the striking employees abandoned the strike to return to work." By mid-January 1986, 101 strikers had crossed the picket line and had returned to work. On the critical date the Company withdrew recognition of the Union, at least 147 former striking employees had abandoned the strike and returned to work. The record shows that 133 of the original strikers were employed by the Company at the close of business on April 4, 1986.

(3) *Violence and threats associated with the strike.* At the commencement of the strike, there were a number of incidents of violence associated with the strike. The record shows that these incidents included damage to property, ranging from a shotgun blast into the home of an employee to slashed tires, and personal threats against employees who crossed the picket line. As a result of these incidents of violence, Bickerstaff filed a complaint in state court on November 14, 1986 seeking injunctive relief against the Union and its officers to prevent recurrence of the threats and acts of violence. On November 15, the Circuit Court of Russell County, Alabama

granted the injunction, restraining the Union and "its members, agents, [and] representatives" from committing acts of violence, threats, injuries, or damage to property. There were no incidents of violence reported after entry of the injunction on November 15.

(4) *Written resignations and dues check-off.* After the commencement of the strike, fifteen former union members tendered written resignations from the Union. The record shows that the Company received twenty-three withdrawals of dues deduction authorizations in addition to the written resignations. Therefore, a total of thirty-eight employees either resigned or withdrew from union dues deductions after the strike began on November 11, 1986.

(5) *Breakdown in union leadership.* Shortly after the strike started, the union experienced internal difficulties involving the resignation of its business manager. On December 12, 1985, Union Business Manager Tommy Williams officially resigned his position. After Mr. Williams' resignation, there was no effort to employ another business agent for Local 246 although a succession of four representatives of the International and the District Council of the Union attempted to function as business agent. On January 3, 1986, the International Union parent labor organization placed the Union under trusteeship and dismissed the Union's elected officials. On the following day, January 4, the District Council assumed control of the Union.

(6) *Union inactivity.* The last meeting between the Union and Bickerstaff occurred on January 13, 1986. On January 23, 1986, Bickerstaff declared an impasse and implemented its final offer. The Union did not respond and Bickerstaff received no further communication from the Union until the Union's letter of April 8, 1986, three months later, by which it offered to enter into a collective-bargaining agreement.

The Company submits that a diminishing number of pickets also indicated the lack of union activity and support for the strike. From a high of 39 pickets and picket lines at three separate locations during the week of November 24, 1985, the number of pickets diminished to 20 by the end of January and, finally, to 8 by mid-March. No pickets were seen by the Company after March 30, 1986.

Prior to the strike, the Company asserts that the Union had been active in pursuing grievances and arbitrations for Bickerstaff employees. After the strike, however, the Union never represented any of the members who filed grievances against the Company. A request for arbitration on a matter pending before the strike was never pursued by the Union. Prior to the Company's withdrawal of union recognition, there were four unfair labor practice charges filed against Bickerstaff.[6] The first three, which were filed during the month of November 1985, were filed by the Union itself. The fourth charge was filed on March 24, 1986, however, it was filed by an individual party without union support or participation.

(7) *Employee dissatisfaction and disillusionment with the Union.* On March 6, 1986, an unfair labor practice charge was filed against the Union by three of Bickerstaff's employees. The charge alleged that the Union failed in its duty to fairly represent Bickerstaff's employees. A letter from the Regional Director of the Board on March 20, 1986, a copy of which was sent to Bickerstaff, set out the following investigative findings:

> Although some of the members of the Local, including some of the Local Union officials, were dissatisfied with the representation provided them by the International Union after the resignation of the business manager, there was no evidence which would

[6] Two of these charges were dismissed by the Board and two were voluntarily withdrawn.

> establish that the International Union's conduct was based on any arbitrary or discriminatory considerations. In addition, even though some of the members of the Local have alleged that representatives of the International Union and the business manager of the Local promised to pay benefits to employees participating in the strike against Bickerstaff Clay Products, the Union's refusal to pay those benefits would not constitute an unfair labor practice.[7]

The Company asserts that the Board's own investigation into the unfair labor charge filed by three of the Union's members verified two factors which were significant in Bickerstaff's decision to withdraw recognition: (1) that members of the Local were dissatisfied with leadership provided by the Union; and (2) that the Union reneged upon promised strike benefits.

(8) *Composition of bargaining unit on April 9, 1986.* When the Company withdrew recognition on April 9, the record shows that 304 employees were working in the bargaining unit. The ALJ noted that by the critical date, at least 147 former strikers had returned to work and a total of 227 replacements had been hired. The ALJ stated that the record did not show what portion of the 304 employees working on April 9, 1986 was made up

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[7] During the strike, the local newspapers carried stories about a strike fund that had been promised to be activated for the benefit of the strikers. However, strikers who returned to work for Bickerstaff expressed disillusionment and dissatisfaction with the Union because such promises never materialized. The Union representative who testified at the hearing acknowledged that he heard certain of the strikers make the following statement which was reported in a local newspaper story concerning the strike:

> Strikers who filed the NLRB charge against the Union said that they are still angry the Union reneged on a promise to set up a strike fund for Local 246. They predict that if Laborers International tries to maintain Local 246, it will find the biggest brick wall at Bickerstaff is between the Union and its estranged members.

of replacements, returning strikers, or employees that did not engage in the strike. However, the Board found that the record shows that on April 4, 1986 there were 304 employees at work, of whom 93 had been hired to replace strikers; 133 were strikers who had crossed the picket lines and returned to work; and 78 were employees who had not struck.

C. Discussion

The decision of *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir. 1978), controlling in this circuit,[8] establishes the standards by which the lawfulness of Bickerstaff's withdrawal of recognition of the Union is to be measured. As in the instant case, the Board decided in *Randle-Eastern* that the employer did not prove it had the required objective evidence to support a reasonable doubt as to the Union's majority status. The Court of Appeals disagreed and reversed the Board's decision. In *Randle-Eastern*, the Fifth Circuit found that three main factors existed which, considered collectively, afforded the Company with an objective basis to doubt the Union's majority status:

> First, 46 [of 166] of the original strikers had returned to work . . . In discounting the value of this evidence, the Board relied on the principle that an employee's return to work during a strike does not by itself provide a reasonable basis for presuming he has repudiated the Union as his bargaining representative. [Citations omitted]. But other factors present here gave the Company a reasonable basis for believing that a good number of the returning strikers no longer supported the Union. The Company had received copies of Union resignation letters

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[8] The decisions of the United States Court of Appeals for the Fifth Circuit prior to September 30, 1981 are binding as precedent in the Eleventh Circuit. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206 (11th Cir. 1981).

from 19 returning strikers and had received information that other reinstatements had also resigned from the Union. Although nonmembership alone does not necessarily indicate nonsupport [citation omitted], resignation after crossing the picket line in a fairly acrimonious strike does.

Second, the Company had hired 47 permanent replacements, of whom six had indicated disinterest in the Union or had been the victims of picket line violence. In the proceedings below, the Board rejected this as evidence of loss of Union support in the workforce, relying on the presumption that new employees "support the Union in the same ratio as those they have replaced." This presumption is usually applied when the employer has experienced high turnover and is trying to escape his bargaining obligations by citing that turnover as his "objective evidence." [Citation omitted]. In our view, however, the presumption does not apply where the "turnover" results from replacement of strikers. *See* R. Gorman, Labor Law 112 (1976): "[I]f a new hire agrees to serve as a replacement for a striker (in union parlance, a strike breaker, or worse), it is generally assumed that he does not support the Uinon and that he ought not be counted toward a Union majority." This is especially true where, as here, the Union is asserting at the bargaining table that the replacements will have to be discharged in order to make room for returning strikers. [Citation omitted].

Third, the Company had been informed by a Union representative that "50 to 25 or 20%" of the strikers would not be returning to work.

Id. at 728.

It is true that an employee's return to work during a strike does not by itself provide a reasonable basis for

presuming that he has repudiated the Union as a bargaining representative. *Allied Indus. Workers, Local Union No. 289 v. NLRB*, 476 F.2d 868, 881 (D.C.Cir. 1973). Absent supporting evidence, it may mean no more than that an employee was forced to work for economic reasons, or that he did not approve of the strike in question but still desires union representation. *Id.; see, e.g., NLRB v. Frick Co.*, 423 F.2d 1327 (3d Cir.1970). But other factors, such as employee resignations and dues deduction withdrawals, may be considered by the Company in determining whether there is an objective basis for believing that a substantial number of returning strikers no longer desired union representation.[9]

In this case, the ALJ and the Board, by adopting his decision, stated that the "38 dues deduction withdrawals do not evidence withdrawal of support and the 15 resignations do not constitute a substantial withdrawal." We note, however, that the Company's evidence surpasses the evidence presented by the employer in *Randle-Eastern*. In that case, the court accepted as evidence indicating the loss of union support the fact that eleven percent (11%) of the employees resigned from the Union after the strike. Here, the Company presented evidence that 38 employees, or thirteen percent (13%) of the bargaining unit, either withdrew from dues check-offs or resigned from the Union.[10]

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[9] The decline in the number of employees participating in a check-off program is recognized as an objective factor upon which a good faith doubt can be based. *Ingress-Plastene, Inc. v. NLRB*, 430 F.2d 542, 546-47 (7th Cir. 1970); *Thomas Indus. Inc., v. NLRB*, 687 F.2d 863 (6th Cir. 1982). "A rapid or a large decline in the number of check-offs may be indicative of loss of support." *Thomas*, 687 F.2d at 868. In *Thomas*, the key factor was "not the percentage of employees on check-offs but rather the rapid decline in check-offs." *Id.* The "rapid" period in *Thomas* was ten months, whereas the Union received all of its withdrawals in this case within a four-month period.

[10] We note that because Bickerstaff did not deduct union dues after the expiration of the contract and the commencement of the

As the court in *Randle-Eastern* recognized, "[a]lthough nonmembership alone does not necessarily indicate nonsupport [citation omitted], resignation after crossing the picket line in a fairly acrimonious strike does." *Id.*, 584 F.2d at 728. In *Randle-Eastern*, there was no description of any specific violence. No returning strikers encountered violence and only a few replacements did. In this case, the ALJ rejected Bickerstaff's evidence because it claims "there was no showing that a substantial number" of those working on the critical date encountered threats or violence.

By adopting the ALJ's findings and conclusions, the Board's position seems to be that the Company could not base its doubt on this set of circumstances because Bickerstaff was able to suppress actual picket line violence with a state court injunction and because Bickerstaff did not specifically identify its workforce members on April 9, 1986 who had been subject to the violence. It should be emphasized, however, that there is no requirement that returning strikers or replacements have crossed the picket line in the face of violence. *See, e.g., Randle-Eastern*, 584 F.2d 720; *National Car Rental System, Inc. v. NLRB*, 594 F.2d 1203 (8th Cir.1979). Regardless, we note that the record is replete with numerous incidents of violence during the first week of the strike. Once a pervasive atmosphere of violence is established in a strike situation, that atmosphere does not vanish as soon as the violence ceases. We conclude that the substantial number of resignations and dues check-off authorizations in the circumstances of this case may be properly taken into consideration when assessing union majority, although that fact, if standing alone, could not justify withdrawal of recognition.

Although mere high employee turnover is not normally a sufficient ground to negate a union's presumed majority

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strike, the Company employees did not have an incentive to withdraw from dues check-off.

status, the permanent replacement of striking employees presents a different situation. *Soule Glass*, 652 F.2d at 1110. Until recently, the Board consistently relied on the presumption that striker replacements support the union in the same ratio as the striking employees whom they replace. *See, e.g., Cutten Supermarkets*, 220 NLRB No. 507 (1975); *Pennco, Inc.*, 250 NLRB 716 (1980). The Board's position, however, has been strongly criticized as unrealistic and uniformly rejected by reviewing courts of appeals. The Eighth Circuit's rejection of the presumption of strike replacement support for the Union in *National Car Rental System v. NLRB*, 594 F.2d 1203 (8th Cir.1979), was couched in particularly strong terms:

> If this presumption were to be employed here, we would reach the ridiculous result of presuming that all of the . . . new employees favored representation by the union even though they had crossed the union's picket lines to apply for work and to report to work each day after they were hired. This presumption of the Board is not specifically authorized by statute and is so far from reality in this particular case that it does not deserve further comment.

Id. at 1206. Most recently, the Ninth Circuit noted that the presumption has never been embraced by any court, and affirmed an administrative law judge's conclusion that under the facts of that case, where the union demanded that the employer reinstate all of the strikers as a condition of any collective-bargaining agreement, it was unrealistic to presume that the strike replacements supported the Union. *Whisper-Soft Mills v. NLRB*, 754 F.2d 1381, 1387-88 (9th Cir.1984).

These two circuits, as well as the First and Fifth Circuits, appear to presume that striker replacements do not support the certified union, and refuse to enforce NLRB decisions grounded on the Board's contrary assumptions. *See Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir.1981); *Randle-Eastern Ambulance*

Service, Inc., 584 F.2d 720 (5th Cir.1978); *see also Curtin Matheson Scientific, Inc. v. NLRB*, 859 F.2d 362 (5th Cir.1988). These circuits seem to rely heavily on the statement made by one commentator, R. Gorman, Labor Law (1970), that "if a new hire agrees to serve as a replacement for a striker (in union parlance, a strike breaker, or worse), it is generally assumed that he does not support the Union and that he ought not be counted toward a Union majority." *Id.* at 112.[11]

In *Randle-Eastern*, our predecessor circuit considered the presumption that new employees support the Union in the same ratio as those they have replaced, and rejected its application where the employee "turnover" results from the replacement of strikers. *Id.*, 584 F.2d at 728. In rejecting the Board's presumption, the court approvingly cited Gorman's view that striker replacements be deemed not to support the union. Recently, in *Curtin Matheson Scientific, Inc. v. NLRB*, 859 F.2d 362 (5th Cir.1988), the Fifth Circuit reaffirmed that *Randle-Eastern* establishes the framework for evaluating a company's withdrawal of recognition of a union. In *Curtin Matheson*, the court reversed the Board's finding that the Company violated the NLRA by withdrawing recognition of the Union. In its decision, the court expressly reaffirmed the Gorman presumption, stating that it was "especially true" where the striker replacements were

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[11] *See Pennco, Inc. v. NLRB*, 459 U.S. 994, 103 S.Ct. 355, 74 L.Ed.2d 392 (1982) (denial of writ of employer's petition for certiorari in *Pennco v. NLRB*, 684 F.2d 340 (6th Cir. 1982)). Justice White, joined by Justices Blackmun and Rehnquist, expressed the opinion that the Court should grant certiorari to address the conflict between the Board and the apparent acceptance of the Gorman presumption by four circuits. Justice White noted that Professor Gorman's original statement was supported only by a single citation to *Titan Metal Manufacturing, Co.*, 135 NLRB 196 (1962), a case that has neither been cited by the Board for the proposition Gorman states nor been expressly overruled. 459 U.S. at 995, 103 S.Ct. at 355.

the victims of picket line violence, and the Union was bargaining for the discharge of the striker replacements to make room for returning strikers.[12] *Id.* at 367 (citing *Randle-Eastern*, 584 F.2d at 728).

On the other hand, the Second and Sixth Circuits refused to countenance any presumption concerning striker-replacements. In *NLRB v. Windham Community Memorial Hospital*, 577 F.2d 805, 812-13 (2d Cir.1978), the court avoided the question of the validity of the Board's approach but rejected the presumption that "no replacement employee supports the Union," describing it as "equally, if not more assailable than the NLRB's [presumption]." *Id.* at 813. The Sixth Circuit likewise "expressly decline[d] to adopt either presumption" in *NLRB v. Pennco, Inc.*, 684, F.2d 340, 342-43 (6th Cir.), *cert. denied*, 459 U.S. 994, 103 S.Ct. 355, 74 L.Ed.2d 392 (1982). The Court held the employer's withdrawal of recognition unlawful because the employer simply did not establish any objective basis, aside from an invalid presumption, for believing that the certified union was not the choice of the majority. The court found that given the facts of the case, the evidence was sufficient "only to put the parties in equipoise." 689 F.2d at 393. The court concluded that the employer "would need some further evidence of union non-support in order to shift the burden to the Board to prove the union in fact had a majority status on the critical day." *Id.*

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[12] In *Curtin Matheson*, the record contained no evidence of picket line or other strike-related violence or threats during the course of the strike. Although there was no picket line violence or negotiating to discharge the striker replacements, the court held that the Company was justified in doubting that the striker replacements supported the Union where a substantial majority of the bargaining unit employees are replaced in a very short period, and where the striker replacements cross a picket line, violent or not, to report to work each day. *Id.* (citing *National Car Rental Systems, Inc. v. NLRB*, 594 F.2d 1203 (8th Cir. 1979)).

Recently, in *Buckley Broadcasting of Calif., Inc. d/b/a Station KKHI*, 284 NLRB No. 113 (1987) ("*Station KKHI*"), the Board addressed the recurring question in withdrawal of recognition cases of whether presumptively to count striker replacements for or against the Union. In *Station KKHI*, the Board departed from its earlier embrace of a presumption that striker replacements support an incumbent union. The Board acknowledged that "there was no articulated basis in reason or policy" for a presumption that strike replacements support the union in the same ratio as the striking employees they replace, but also declined to adopt a countervailing presumption that replacements oppose the Union. The Board concluded that too many variables are present in a strike situation to confidently advance any generalization about the motives of strike replacements. Instead, the Board adopted a neutral, fact dependent approach derived from the Sixth Circuit in *Pennco, Inc.* The Board's ad hoc approach, then, is to consider the union sentiments of striker replacements on an all-of-the-circumstances basis, requiring "some further evidence of union non-support" of the employees who are hired as replacements for strikers in order to establish a good faith doubt. *Station KKHI*, 284 NLRB 113 (quoting *Pennco*, 684 F.2d at 343).

The *Curtin Matheson* court raised the question of whether the Board's position in *Station KKHI* establishes a "new" standard for characterizing strike replacements in withdrawal of recognition cases. The *Curtin Matheson* court rejected the Board's contention that *Station KKHI* established a new standard because

> [o]perationally the *Station KKHI* standard has the same effect as the presumption that striker replacements support the union in the same ratio as the employees they replace. . . . Under either standard, the Company is required to have objective evidence regarding the striker replacements' non-support in

> order to count them as employees whom the Company doubts support the Union.

Id. at 367.

It is true, as the *Curtin Matheson* court notes, that under both the Board's prior presumption of union support among replacement workers and its current neutral position under *Station KKHI*, an employer must come forward with some objective evidence regarding the replacement worker's failure to support the union. This does not mean, however, that the two standards are the same. The difference is the nature and amount of evidence required. Simply stated, the new Board position gives more flexibility to consider each situation on its own facts. *See Curtin Matheson*, 859 F.2d at 370 (Williams, J., dissenting).

The question is presented whether the Board's position established in *Station KKH!* can be reconciled with the decision of the former Fifth Circuit in *Randle-Eastern*. The holding of *Randle-Eastern* is that the presumption that new workers support the union in the same ratio as the employees they have replaced "does not apply where the 'turnover' results from the replacement of strikers." 584 F.2d at 728. While the court did approvingly cite to Professor Gorman's treatise, its decision to include permanent replacements as objective evidence of loss of union support was based on the fact that the Union was bargaining for the discharge of the striker replacements to make room for the strikers. The existence of picket line violence with respect to striker replacements was also a factor which strengthened the Company's doubt that those employees support the Union.

We decline to read *Randle-Eastern* so broadly as to establish an unqualified rule applicable in every strike situation where replacement workers are hired. The decision in *Randle-Eastern* should be limited to the spe-

cific facts of the case.[13] Read more narrowly, *Randle-Eastern* does not conflict with the Board's *Station KKHI* ad hoc approach since the evidence presented by the employer in *Randle-Eastern* is sufficient to satisfy the requirement of *Station KKHI* that the Company present "some further evidence of union non-support" in order to count replacements as employees whom the company doubts support the Union. *See Pennco*, 684 F.2d at 343.

In this case, the Company expressly rejected proposals made by the mediator on behalf of the Union that Bickerstaff's strike replacements be discharged so that striking employees could return to work.[14] Moreover, as previously noted, the strike replacements had to cross a picket line, at least for a time, in an atmosphere of violence. Common sense dictates that it is highly unlikely that a replacement worker supports the union if the

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[13] We decline to speculate as to what other factors, if any, may be sufficient to constitute "some further evidence of union non-support." *See Pennco*, 684 F.2d at 343. The *Randle-Eastern* decision is analogous in this respect to *Whisper-Soft Mills, Inc. v. NLRB*, 754 F.2d 1381 (9th Cir. 1984). After expressly rejecting the presumption that striker replacements support the union in the same ratio as strikers, the court concluded that the ALJ was correct in determining that the replacement workers did not support the Union under the "unique circumstances" of the case: the Union was demanding discharge of a majority of the replacement workers. 754 F.2d at 1388. In *Whisper-Soft*, there was no violence, no rejection of union leadership, no resignation, and no union dormancy.

[14] The Board submits that the mediator rather than the union in this case made the inquiries as to whether the Company could take back the striking employees in preference to the replacements. The Board argues that this inquiry "hardly matches the evidence in *Randle-Eastern*" of union demands. We note in *Randle-Eastern*, as in this case, the facts show active participation by the mediator on behalf of the Union for the preference of returning strikers over replacements. Moreover, the Board's characterization of union demands are overstated. The facts in *Randle-Eastern* show that the Union, after taking its initial position that returning strikers be given priority over the replacements, stated that it would be "flexible" on the replacement versus returning strikers issue. 584

union is negotiating for his discharge and he crosses a union-sponsored picket line, violence or not, to report to work each day. Under the facts of this case, we conclude that the Company was justified in counting the striker replacements as employees whom the Company doubts supports the Union.

A comparison between the bargaining unit in *Randle-Eastern* and the bargaining unit in this case is instructive for purposes of applying the *Randle-Eastern* criterion[15] The comparison illustrates that the Bickerstaff

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F.2d at 724. In both cases, the Union was negotiating against the interests of the replacements.

[15] SUMMARY OF THE BARGAINING UNIT ON WITHDRAWAL OF RECOGNITION

	Randle-Eastern	Bickerstaff
1. Number of employees in the unit on the date of strike	177	304
2. Number of employees participating in the strike	166(94%)	195(64%)
3. Number of strikers who had returned to work on the date of non-recognition	46(26%)	133(44%)
4. Number of employees who resigned or withdrew from dues authorizations after the strike	19(11%)	38(13%)
5. Number of permanent striker replacements working on date of non-recognition	47(27%)	93(31%)

We note that since striking employees retain their employee status under section 2(3) of the Act, 29 U.S.C. Sec. 152(3), the bargaining unit for purposes of determining the union's majority status in a case where the employer has hired striker replacements consists of the total number of strikers *and* strike replacements at the time of withdrawal of recognition. *C.H. Guenther & Son, Inc. v. NLRB*, 427 F.2d 983, 986-87 (5th Cir.), *cert. denied*, 400 U.S. 942, 91 S.Ct. 240, 27 L.Ed.2d 246 (1970); *NLRB v. Winham Community Memorial Hospital*, 577 F.2d 805, 813 (2d Cir. 1978). In the instant case, the Board submits that there were 50 employees still

percentages in all the relevant categories exceeded those found in *Randle-Eastern;* strike participation (Bickerstaff had a lower percentage of its employees to go out on strike than *Randle-Eastern*) ; returning strikers (Bickerstaff had a higher percentage of strikers to return to work than *Randle-Eastern*) ; resignations or check-off withdrawals (Bickerstaff had a higher percentage of employees who either resigned or withdrew from dues check-off authorizations than *Randle-Eastern*) ; and striker replacements (Bickerstaff had a higher percentage of striker replacements than *Randle-Eastern*).

The only other factor present in *Randle-Eastern* which is not present in this case was the union's statement that twenty percent of the strikers would not be returning to work.[16] 584 F.2d at 727. On the basis of these factors, the *Randle-Eastern* court recognized the existence of a good faith doubt of union support. In this case, there are a number of other factors in the record which support the Company's good faith doubt of majority status which were not present in *Randle-Eastern.* These factors

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on strike at the time the company withdrew recognition which should be included in the bargaining unit of 304 employees, resulting in a total of 354 unit members. The Company contends that the record shows a number of strikers who should not be included in the total bargaining unit because they either obtained permanent employment elsewhere or did not want to return to work. According to the Union's position, the Company was required to have a good faith belief that at least 177 of the unit employees did not desire union representation.

[16] The Company did rely on a statement of a union organizer, which was quoted in a local newspaper in January 1986, indicating that most of the strikers "would never go back to work" for Bickerstaff unless they received a favorable settlement of the strike. The company contends that since the Union's demands were so unreasonable, this statement was tantamount to saying that those strikers had no intention of returning. We note that this "subjective evidence may be used to bolster the argument that such doubt existed." *See NLRB v. Windham Community Memorial Hospital,* 577 F.2d 805, 811 (2d Cir. 1978).

include the breakdown in union leadership, union dormancy, and employee dissatisfaction and disillusionment with the Union.

The Board relies on *Pepsi Cola Bottling Co., etc. v. NLRB*, 659 F.2d 87 (8th Cir. 1981) for the proposition that an offer, once made, will remain on the table unless explicitly withdrawn by the offeror or unless circumstances arise which would lead the parties to reasonably believe that the offer had been withdrawn. *Id.* at 90. The Board concluded that the Company "did not withdraw its final offer before acceptance and the evidence reveals no 'circumstances . . . which would lead the parties to reasonably believe that the offer had been withdrawn.'" This conclusion, however, ignores the change in circumstances which had occurred by the time the Company withdrew recognition. After the meeting between the Union and the Company on January 13, 1986, Bickerstaff received no further communication from anyone on behalf of the Union with regard to contract negotiations, grievances, the strike or any other matter, until the Union's letter of April 8, 1986, by which it offered to enter into a collective-bargaining agreement. During this period of time, the Union was totally inactive. There was no documented participation by bargaining unit members in any union-sponsored activities after January of 1986. The only grievance filed against the Company during this time period was filed by an individual without union support or participation. The business agent had resigned nearly four months prior to withdrawal of recognition. No new business agent for the Local had been appointed and the Local's elected officials were removed from office. An unfair labor practice charge was filed against the Union by three of Bickerstaff's employees on March 6, 1986, alleging a failure by the Union to fairly represent its members as the bargaining representative. The Board's own investigation into this charge verified that some members of the Local were dissatisfied with the Union representation, which stemmed

in part from the failure to pay strike benefits as promised by the Union. The evidence in the record shows that the Union had effectively abandoned its role as the representative of the unit employees by the time the Company withdrew recognition.

There is no authority cited by the Board, and none exists, for the proposition that withdrawal of a prior offer is a condition precedent to an employer's withdrawal of recognition based on a good faith doubt of the Union's majority status.[17] If the circumstances changed such that the Company reasonably believed that the Union no longer represented a majority of its employees on April 8, 1986, Bickerstaff had no duty to withdraw its offer by notifying the Union.

The Board has rejected a composite showing of objective evidence which is sufficient to establish, clearly and convincingly, that Bickerstaff had a reasonable basis to support a good faith doubt as to the representative status of the Union. Unlike many other cases in which the circuit courts have upheld the Board's determination that the employer did not have a reasonable basis for doubting the Union's majority status, we conclude that Bickerstaff's doubt

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[17] The events leading to the withdrawal of recognition in this case are essentially identical to those found in *Curtin Matheson*, 859 F.2d at 364. In *Curtin Matheson*, the Company made a final offer which was rejected twice by the Union. While the strike was in progress, the Company put into effect the wage schedule proposed in its final offer. Within a month, the Union ended the strike, offered unconditionally to have the striking employees return to work, and informed the Company that it was accepting its final offer. Thereafter, the Company notified the Union that the final offer was not available, and because it had doubts as to the Union's majority status, that the Company was withdrawing recognition and refusing to bargain further. In *Curtin Matheson*, as in this case, there was no formal withdrawal of the final offer before the withdrawal of recognition based on a good faith doubt of majority status.

> was not based solely upon "speculative and subjective" evidence [citation omitted], dependent upon "isolated reports" from "vague and unidentified sources" [citation omitted], or predicated upon the President's "feeling" that the Union had lost majority support [citation omitted]. Rather, the Company made permissible inferences from solid evidence . . . which in our view were sufficient to support a reasonable doubt of the Union's continued majority status.

Randle-Eastern, 584 F.2d at 729. Consequently, we are unable to conclude that substantial evidence on the record as a whole supports the Board's conclusion that the Company unlawfully withdrew recognition.

In determining whether an employer has sufficient objective evidence of loss of union support to justify withdrawal from bargaining, the cumulative effect of *all* of the evidence must be considered. *Thomas*, 687 F.2d at 868. Generally, several indicia of loss of majority support are required and no one factor is determinative, i.e., striker replacements or union dormancy. *Soule Glass*, 652 F.2d at 110. We acknowledge that the above factors do not translate readily into a "precise numerical estimate" of the Union's strength, but this is not fatal to the Company's case. *Randle-Eastern*, 584 F.2d at 729. We emphasize that the Company need not have conclusive proof that the majority of employees do not support the Union, only sufficient "objective evidence to support a good faith doubt of majority status." *Id.* In our view, the Board has erroneously looked at each piece of evidence in isolation, instead of looking at the totality of factors presented by the Company. The Ninth Circuit, in reversing a Board order finding insufficient evidence in a good faith doubt case, had this criticism of the Board which is applicable to this case:

> The Board concluded that each fact considered separately did not give [the Company] reasonable

> grounds to doubt the union's majority status and that the evidence as a whole was no greater than the sum of its separate parts. . . . The courts require an assessment of the cumulative force of the combination of factors [citations omitted]. Even when each factor considered alone is insufficient for a good faith doubt of majority status, the combination may be adequate.

Golden State Rehabilitation Convalescent Center v. National Labor Relations Board, 566 F.2d 77, 79-80 (9th Cir. 1977).

We therefore reverse the Board's finding that the Company violated Sections 8(a)(1) and (5) by withdrawing recognition of the Union. The court also reverses the Board's findings that the Company violated these sections by refusing and failing to furnish the Union with certain information requested, and refusing to execute a collective-bargaining agreement the Board found was reached on April 8, 1986. Since an employer is only obligated to provide its employees' bargaining representative with information necessary and relevant to fulfill its statutory collective-bargaining function, the Company did not commit an unfair labor practice by refusing to provide the information requested. *See Curtin Matheson*, 859 F.2d at 367. By the same logic, no violation of Sections 8(a)(1) and (5) occurred when the Company refused to execute a contract when the Union attempted to accept the Company's November 6, 1985 offer.

ENFORCEMENT DENIED.

BSC

D—4779
Phenix City, AL

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 10—CA—21681

BICKERSTAFF CLAY PRODUCTS, CO., INC.,

and

LABORERS' LOCAL UNION NO. 246

DECISION AND ORDER

On 15 December 1986 Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] as

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[1] The judge states that the record does not show what portion of the 304 employees working on 9 April 1986 was made up of replacements, returning strikers, or employees that did not engage in the strike. We note, however, that the Respondent's Exh. 29 shows that on 4 April 1986 there were 304 employees at work, of whom 93 were replacements, 133 were strikers who had returned to work, and 78 were employees who had not struck.

[2] In agreeing with the judge that the Respondent has not shown that it had a good-faith doubt based on objective considerations that the Union represented a majority of its employees when it withdrew recognition on 9 April 1986, we find that the total evidence presented by the Respondent is insufficient to rebut the

modified,[3] and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Bickerstaff Clay Products, Co., Inc., Phenix City, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Insert the folowing as paragraph 2(e) and reletter the subsequent paragraphs accordingly.

"(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necesary to analyze the amounts due under the terms of this Order."

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presumption of the continued majority status that the Union enjoyed as the incumbent bargaining representative. We find it unnecessary to apply any presumption whether the employees who replaced the strikers supported or did not support the Union. See *Station KKHI*, 284 NLRB No. 113 (July 27, 1987). Moreover, in accepting the judge's conclusion that the Respondent has not met its burden of establishing a good-faith doubt, we note that the evidence does not show any linkage between the changes that took place in the Union's leadership and any employee dissatisfaction with the Union.

[3] We add to the remedy section of the judge's decision the provision that interest on any monetary award be computed in accordance with our decision in *New Horizons for the Retarded*, 283 NLRB No. 181 (May 28, 1987). Interest on and after 1 January 1987 shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to 1 January 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621) shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

Dated, Washington, D.C. 30 September 1987

MARSHALL B. BABSON, Member

JAMES M. STEPHENS, Member

MARY MILLER CRACRAFT, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

JD(ATL)—81—86
Phenix City, AL

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

Case 10-CA-21681

BICKERSTAFF CLAY PRODUCTS, CO., INC.

and

LABORERS' LOCAL UNION NO. 246

Richard Y. Bradley, Counsel for Respondent.

Mary L. Bulls, Counsel for General Counsel.

DECISION

Statement of the Case

J. Pargen Robertson, Administrative Law Judge. This case was heard in Columbus, Georgia, on 16 July 1986. The complaint alleged that Respondent violated Section 8(a)(1) and (5) by withdrawing recognition from Laborers' Local Union No. 246 on 9 April 1986; by refusing to sign a collective-bargaining agreement with the Union; and by refusing to provide the Union with requested information regarding bargaining unit employees from 9 April 1986. In its answer Respondent denied that it is an Alabama corporation as alleged in the complaint. However, Respondent admitted that it is engaged in the manufacture and sale of brick and concrete products at its Phenix City, Alabama, operations

and that it meets the Board's commerce standards and is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Although Respondent answered that it has insufficient information to respond to the allegation that the Union is a labor organization, the entire record showed that Respondent and the Union have negotiated various collective-bargaining agreements regarding wages, hours, and other conditions of employment for employees of Respondent on regular occasions since 1965. Respondent and the Union last met for the purpose of negotiating a contract on 13 January 1986. Subsequently, as shown below the Union offered to accept a collective-bargaining agreement proposal of Respondent on 8 April 1986. In view of that evidence I find that the Union is, and has been at all times material herein, a labor organization engaged in commerce within the meaning of Section 2(5) of the Act.

General Counsel also alleged that Respondent has violated Section 8(a)(1) and (3) of the Act since 8 April 1986, by refusing to reinstate employees that engaged in a strike. However, by motion included in her brief, Counsel for General Counsel moved to withdraw complaint paragraphs 17 and 19 which alleged that Respondent has refused to reinstate striking employees. Counsel for General Counsel asserted in that motion that the evidence presented by Respondent during the hearing herein, "established that it had hired permanent replacements to fill the positions of striking employees; . . . and striking employees who sought reinstatement are being reinstated as openings occur." In view of the record, I grant General Counsel's motion to withdraw paragraphs 17 and 19 of the complaint.

Since 1965 the Union, Laborers' Local No. 246, has represented certain of Respondent's employees. At that time the Union was certified as the exclusive bargaining representative for employees in one of Respondent's three

plants. Subsequently, in 1966, Respondent voluntarily recognized the Union as the exclusive representative for all employees in the below described unit, after Respondent consolidated its operations into a single corporate entity:

> All production and maintenance employees employed by Respondent at its Plants 1 and 2, Ceramic, Alabama; Plant 3, Dixieland, Alabama; and Plant 4 at Brick Yard, Alabama, including the Sample Department (Ceramic, Alabama), but excluding the Material Handling Division, plant clerical employees, supervisors, office clerical and professional employees as defined in the Act.

Respondent and the Union negotiated several collective-bargaining agreements and their most recent agreement expired on 31 October 1985. On 29 August 1985 the Union advised Respondent of its plan to negotiate changes in the existing collective-bargaining agreement. Respondent and the Union met, and negotiated on several occasions beginning on 17 September 1985.

Respondent made a "final offer," on 6 November 1985. On 11 November 1985, the Union struck. Out of the bargaining unit of 304 employees, 195 employees originally participated in the strike against Respondent. Respondent did not cease operations. One hundred and nine unit employees did not engage in the strike, and Respondent immediately began hiring permanent replacements for the striking employees.

On 20 January 1986, those unit employees actually working totalled 300. Respondent offered evidence that before 20 January and continuing thereafter, it was at "full strength" of bargaining unit employees.

On 23 January 1986, Respondent advised the Union that negotiations were at an impasse and that it was instituting increased "wages and other benefits for those

working in the plants in accordance with the company's final proposal which was made on November 6, 1985."

By 8 April 1986 letter, the Union advised Respondent that it accepted "the final offer made by the company on November 6, 1985." In that letter the Union asked for a listing of all employees currently working along with various matters regarding each working employee.

On 9 April 1986, Respondent wrote the Union:

> This will acknowledge receipt of your letter of April 8, 1986 regarding your union and Bickerstaff Clay Products Company, Inc.
>
> Based upon facts and circumstances which have occurred since the strike at our client's plant, we seriously doubt that your union represents a majority of our employees. Under these circumstances we do not believe that we can recognize your union as the bargaining agent for our employees. Therefore, our last offer is no longer outstading to your union and your offer to sign a collective bargaining agreement with our client is declined. Furthermore, your request for information about our employees is refused.

On 9 April 1986, at least 147 former striking employees had abandoned the strike and returned to work with Respondent.[1]

At the hearing,, Respondent's chief executive officer responded to questions regarding matters which he considered in determining to withdraw recognition from the Union. That testimony, which is paraphrased below, included:

> (1) To the question did the significant number of replacements of former strikers that came back to work in spite of "the violence," indicate whether the

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[1] Respondent's records show that 147 former strikers had returned by the period ended on 6 April 1986. The next reporting period ended on 13 April. As of that date 149 former strikers had returned to work.

employees desired to have the union continue to represent them, Richard Bickerstaff, replied that that factor indicated to him that the employees had no interest in the Union representing them and it further indicated to him that the people that had gone on strike were beginning to feel that they had been totally mislead, intimidated, and harrassed.

(2) To the question what part if any, did the receipt by Respondent of some 38 "written resignations either from membership or from the checkoff" have to do with your decision to withdraw recognition, Bickerstaff replied that was an indication that some of the employees had taken close enough notice of the situation to actually resign in writing. However, he went on to say that the other employees "didn't see the need to turn in a resignation," in view of the fact that there was no dues checkoff and the employees "all felt that they were out of the union because they were working."

(3) To the question whether the fact that the Union did not involve itself in grievances on behalf of employees after the strike commenced have any significance in the determination to withdraw recognition, Richard Bickerstaff responded that he assumed that the union had "abandoned." Richard Bickerstaff also testified that his daily routine carried him past the union hall on his way home, and that he noticed a drop off in activity around the hall from the time the strike began until he decided to withdraw recognition.

(4) Richard Bickerstaff testified that some of the returning employees expressed disillusionment and dissatisfaction with the Union because, to his knowledge, no strike funds were made available to striking employees.

(5) Bickerstaff testified that he was also impressed with his understanding that under the circumstances

similar to those existing with Respondent at the time he withdrew recognition, another local of the national union had abandoned a bargaining unit at a nearby employer in the same industry as Respondent.

(6) In response to his attorney's questions, Bickerstaff testified that he was also influenced in determining to withdraw recognition, by local newspaper articles indicating that one of the striking employees had said that he and most of the others on strike would never go back to work for Bickerstaff unless the employees won a favorable settlement. That newspaper article was dated 8 January 1986.

(7) In making his decision to withdraw recognition Bickerstaff testified that he was also influenced by the fact that an NLRB unfair labor practice charge against Respondent in March 1986 was filed by an individual rather than the Union, and by the fact that on 6 March 1986, an unfair labor practice charge was filed against the Union alleging that the Union had failed in its duty to fairly represent Bickerstaff employees.

(8) Bickerstaff testified that he was also influenced in determining to withdraw recognition by the fact that the number of pickets at Respondent's facilities dropped off considerably from the time near the beginning of the strike until the period shortly before he withdrew recognition. In that regard Respondent offered evidence showing that the total number of pickets at Respondents's facilities fluctuated between 14 and 39 until 22 December 1985. Subsequently, during March 1986, the total number of pickets did not exceed eight and during the week ending 30 March 1986 there were only two employees picketing Respondent's facilities. Since 30 March 1986 there have been no pickets at Respondent's facilities.

Conclusions

Section 7 of the National Labor Relations Act provides to employees the exclusive right "to bargain collectively through representatives of their own choosing" or "to refrain from any and all such activities . . ." In view of those provisions it is important to exercise caution where, as here, the determination as to representation or lack of representation is made by an employer. *NLRB v. Koenig Iron Works, Inc.*, 681 F.2d 130, 137, 138 (1982).

Both the Board and the Courts have historically proceeded cautiously in cases of this type. In instances where the employer and the Union were parties to one or more collective-bargaining agreements it is presumed that the Union continued to serve pursuant to the wishes of a majority of the employees in the bargaining unit. *Atlanta Hilton & Towers*, 278 NLRB No. 76 (1986). That presumption continues after the collective-bargaining agreement expires *Carmichael Construction Company*, 258 NLRB 226 (1981), and maybe rebutted by evidence showing either;

> (1) That the Union actually lost its majority support; or
>
> (2) That the employer had a good-faith doubt based on objective considerations of the continued existence of majority support for the Union. *Aqua Slide'N' Dive Corporation*, 281 NLRB No. 34 (1986); *Pennco, Inc.*, 250 NLRB 716 (1980) enfd. 684 F.2d 340 (6th Cir. 1980).

In the instant case the record does not show that the Union actually lost majority support. Instead Respondent argues that it had a good-faith doubt based on objective considerations, that the Union maintained majority support.

As to General Counsel's allegation that the parties reached a collective-bargaining agreement which Re-

spondent refused to sign on 9 April 1986, the record offers support for that complaint allegation. On 6 November 1985, Respondent made a final offer of a new collective-bargaining agreement. On 11 November 1985 the Union struck Respondent's operations. Thereafter, on 23 January 1986 Respondent notified the Union, in part:

> The Company is desirous of increasing wages and other benefits for those working in the plants in accordance with the Company's final proposal which was made on November 6, 1985.
>
> After due consideration, we have concluded that negotiations are and have been at an impasse and accordingly, the Company will put its final proposal into effect as of January 27, 1986.

Subsequently, by 8 April 1986 letter, the Union wrote Respondent as follows:

> This is to inform you that Laborers' Local 246, affiliated with the Laborers' International Union of North America, AFL-CIO, has accepted the final offer made by the Company on November 6, 1985.
>
> It is my understanding that the Company has implemented the terms of that final proposal on January 27, 1986. We will be available to meet and sign the Agreement on Monday, April 21, 1986 if this meets with your schedule. Please contact the undersigned at 404-325-0006 to confirm this date. If you need assistance in preparing the document for signature please contact me.
>
> Additionally, please foward to me a listing of all employees currently working at your Phenix City, Alabama operations. Along with their name, please include the following information: address, phone number, social security number, date of hire, job assignment, rate of pay, marital status, shift, and number of dependants.

> By this letter we are offering an unconditional return to work for all striking employees and request you provide me with a listing of all employees you place on the preferential hiring list.
>
> I look forward to seeing you on the 21st of this month.

On the following day, 9 April 1986, as shown above, Respondent informed the Union that its final offer was no longer outstanding and that it would not sign a collective-bargaining agreement.

On 8 April 1986, Respondent had taken no action to withdraw its contract offer of 6 November. The 8 April letter stated categorically that the Union accepted Respondent's 6 November offer. At that time Respondent had not questioned the Union's majority status.

Respondent's chief operating officer, President Herbert Fuller, testified that in negotiations before 6 November 1985, Respondent and the Union had reached agreement on all but a few points, such as "probationary period, bulletin board use, call in pay . . . (w)e were still drastically apart on the economic issues." Regarding economics Fuller's testimony shows that the parties had failed to agree on wage increases, increased pension and insurance contributions and holidays. Respondent's 6 November "final offer" covered all the outstanding issues mentioned by Fuller and, in combination with the other issues previously agreed to by Respondent and the Union, constituted a complete contract.

On 10 November 1985 Respondent was advised by the local's business agent, that the "Union has voted to reject the offer and to strike effective 6 a.m., Monday morning, November 11."

Before the strike, Respondent and the Union had negotiated with the assistance of a Federal Mediator. After the strike Respondent and the Union met again on 18 November and 9 December and negotiated with the as-

sistance of the Federal Mediator. On 12 December Respondent's chief executive officer, Richard Bickerstaff, met with a representative of the International Union, Paul Chappelear. Finally, Respondent and the Union met and negotiated with the assistance of the Federal Mediator on 13 January 1986.

On 23 January 1986 Respondent notified the Union that in its view negotiations were at an impasse and it was implementing increased "wages and other benefits . . . in accordance with the company's final proposal which was made on November 6, 1985."

Jurisprudence indicates that Respondent's 6 November final offer may have remained outstanding despite original rejection of that offer. In *Pepsi Cola Bottling Co., etc. v. NLRB*, 659 F.2d 87, 90 (8th Cir. 1981), the court held:

> Under the policy (of the National Labor Relations Board), an offer, once made, will remain on the table unless explicitly withdrawn by the offeror or unless circumstances arise which would lead the parties to reasonably believe that the offer had been withdrawn." (See also the underlying Board Decision, *Pepsi Cola Bottling Co.*, 251 NLRB 187, 189 (1980); *Pennasquitos Gardens, Inc.*, 236 NLRB 994 (1978) enfd. 604 F.2d 225 (9th Cir. 1979); *Shawns Lunch Service*, 261 NLRB 836 (1982).

The facts in *Pepsi Cola*, were similar to those here in that the Union engaged in an economic strike and rejected the company's final offer.

Here Respondent did not withdraw its final offer before acceptance by the Union and the evidence reveals no "circumstances . . . which would lead the parties to reasonably believe that the offer had been withdrawn." In fact, Respondent's 23 January letter expressed its intent to implement the provisions of that offer. Respondent contends that the Union abandoned its role as repre-

sentative of the unit employees. However, that argument must be rejected. Respondent offered evidence showing that it was aware of continued picketing in support of the Union's strike through 30 March 1986, and Respondent was aware of involvement by the International Union. Respondent presented evidence regarding an unfair labor practice charge filed against the Union on 6 March 1986. In his letter dismissing that charge which was sent to the Union and Respondent, the National Labor Relations Board's Regional Director mentioned findings that although the union's local business agent had resigned, the local was placed under trusteeship of the International and the "International Union's Regional Office sent a number of representatives to the local in an effort to assist the local members who were participating in a strike against Bickerstaff Clay Products." Respondent was aware of the International Union's activities. Respondent negotiated with the representatives from the International and it was to those representatives from the International that Respondent sent its 23 January 1986 letter.

Finally, even though Respondent's "final offer" was accepted by the Union's business agent without a supporting vote of the members, the record evidence illustrated that the business agent had constitutional authority to accept Respondent's contract proposal.

I find that from 8 April 1986, Respondent and the Union were parties to a new collective-bargaining agreement as finally proposed by Respondent to the Union on 6 November 1985. [*Cowles Publishing Company*, 280 NLRB 105 (1986).]

Respondent defends the allegation that it also violated Section 8(a)(5) by withdrawing recognition of the Union on 9 April, on the grounds that it had a good-faith doubt of the Union's majority status.

Respondent contends that it was justified in withdrawing recognition because of a presumption that new hires

and former strikers who cross a picket line in an atmosphere of violence, do not support the Union. As of 9 April 1986, 304 employees were actually working in the bargaining unit. However, there was no showing that a substantial number of those employees initially crossed the picket line while there was on-going incidents of violence flowing from the strike.

The record does show incidents of violent activity. However, those incidents occurred at the very beginning of the strike. On 15 November Respondent, with the consent of the Union, secured an injunction prohibiting violence. A newspaper article reported that on 14 November a "shotgun blast was fired into the home of a Bickerstaff Clay Product's Co., employee who had continued to work during the strike. . ." That article which was dated 17 November 1985, reported that shotgun blast was the second shooting incident since the strike and that other incidents including slashed tires, had been reported to police. Subsequently, the same newspaper, the Columbus, Georgia Ledger-Enquirer, published a calendar of events in the "Bickerstaff strike." The only incidents of violence mentioned in that 10 November through April calendar of events were the two shooting incidents mentioned above. The calendar listed those shooting events as occurring 13-14 November. Finally, affidavits filed with the Respondent's 15 November 1985 petition for a Writ of Injunction, included only some of the incidents of violence mentioned above, along with some threats against employees. The 17 November newspayer article reported two cut tires on Monday night—11 November.

All the reported violent activity occurred from the evening of 11 November through the evening of 14 November. There were no incidents of violence after Respondent was granted an injunction on 15 November.

According to Respondent's records 85 replacements were hired before the close of business on 15 November

1985. As shown above, 109 employees did not participate in the strike. On 17 November, which is the first date shown on records in file, four strikers had returned to work.

When Respondent withdrew recognition on 9 April, 304 employees were working in the bargaining unit. At that time at least 147 strikers had returned to work and a total of 227 replacements had been hired. The record does not show what portion of the 304 employees working on 9 April, was made up of replacements, returning strikers, or employees that did not engage in the strike. Nor does it show how many of the employees that were working on 15 November remained at work on 9 April.

In a recent case the Board found that an employer was justified in withdrawing recognition from a Union on the grounds of good-faith doubt as to continued majority status. However, in that case, *Stormor, Inc.*, 268 NLRB 860 (1984), the credited evidence showed that replacements and returning strikers crossed the picket line despite "continued violent strike activity over an extended period—approximately 3½ months" and that "approximately 20 percent of the nonstriking employees, speaking for themselves and in some instances purporting to speak for other nonstrikers" repudiated or rejected the Union.

Here the period of violent activity was brief and the evidence regarding rejection or repudiation was limited to 15 employees who resigned from the Union. Although Richard Bickerstaff testified that "people" indicated "disillusionment and dissatifaction with the Union because the Union failed to provide the promised strike benefits," Bickerstaff was unable to recall the name of any of those people.

The instant case is closely aligned with the facts in *NLRB v. Pennco, Inc.*, 684 F.2d 340 (6th Cir. 1982) cert. denied 103 S. S. Ct. 355. There the court enforced a Board order holding that an employer violated Section

8(a)(5) by withdrawing recognition. Although there was picket line violence in *Pennco*, the Board refused to endorse the employer's action where the picket line violence occurred 3½ months before the withdrawal of recognition. Here, the violence occurred almost 5 months before Respondent withdrew recognition (See also the Board's Decision in *Pennco, Inc.*, 215 NLRB 716 (1980).

Respondent argues that it received 38 withdrawals from employees. The record shows that of the 38 withdrawals of dues checkoff deduction authorization, only 15 employees expressed a desire to resign from the Union. Additionally, Richard Bickerstaff testified that employees other than the 38 that submitted dues deduction withdrawals all felt that they were out of the Union.

Respondent offered no objective evidence supporting Bickerstaff's testimony that other employees felt they were out of the Union. His "belief" without some foundation is entitled to no weight. The 38 dues deduction withdrawals do not evidence withdrawal of support, and the 15 resignations do not constitute a substantial withdrawal. (See *NLRB v. Koenig Iron Works, Inc.*, 681 F.2d 130, 138 (2nd Cir. 1982)

Respondent's argument that the Union abandoned its representative role does not find support in the record. Even though the contact between the Union and Respondent lapsed between Respondent's 23 January letter and the Union's letter of 8 April, the Board has consistently found that longer periods do not justify a finding that the Union has abandoned its role. *Cowles Publishing Company*, 280 NLRB No. 105, slip op. p. 16 (1986). Here the Union's presence was apparent by its picketing activity through 30 March—some 8 days before the Union accepted Respondent's final contract offer. Bickerstaff's testimony that he did not see sustained activity when he drove by the union hall does not establish absence of union activity. Moreover, even though the union busi-

ness agent resigned in early December 1985, the Union was in trusteeship under direction of the same business agents from before the Union's and Respondent's last negotiating session on 13 January, until after Respondent withdrew recognition. Therefore, the change in business agents does not contribute to a valid good-faith doubt *Cowles Publishing Co., supra.* As in *Cowles Publishing Co.*, the Union's involvement in grievance activity lapsed following the 11 November strike. However, Respondent did not advise the Union of any grievances after 11 November and the one unfair labor practice charge against the Union alleging failure of representation, was dismissed by the Regional Director.

Contrary to Respondent's contention, the record does not show any relationship between the instant circumstances and the fact that another local of the International abandoned its representation duties at another unrelated employer in Central Georgia.

Although picketing activities dropped off until it ceased on 30 March, that action shows only that those employees finally abandoned the strike. That abandonment was admitted by the Union's 8 April letter offering, on behalf of the striking employees, to return to work. That offer also mitigates the affects of newspaper articles pointed to by Richard Bickerstaff indicating that some employees vowed not to return to work until they received a favorable settlement. The letter offered to return to work all strikers. [See *NLRB v. Koenig Iron Works, Inc.*, 681 F.2d 130, 144 (2nd Cir. 1982).]

The Decision in *NLRB v. Randel—Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir. 1978) which was cited by Respondent must be distinguished. In *Randal Eastern* the Union did not agree to a contract before the employer withdrew it final offer. As in this case, *Randal Eastern* hired replacements during an economic strike and several returning strikers resigned from the Union. However, the record does not show substantial

repudiation or factors permitting an inference of repudiation of the Union to the extent found in *Randal Eastern*. In *Randal Eastern* 19 of the 46 returning strikers resigned from the Union. Here only 15 of 147 resigned. In *Randal Eastern* some of the 47 permanent replacements indicated disinterest in the Union. Here the record does not show the number of replacements that were actually working on 9 April, but there was no probative evidence showing that a substantial number of the replacements expressed disinterest in the Union. Finally, although one striker indicated that he would not return absent an acceptable settlement, there was no evidence showing that anyone declined the right to reinstatement. On 8 April the Union made an unconditional offer on behalf of all strikers to return to work. In *Randal Eastern* the Union told the employer that 20 percent of the strikers would not return to work.

The facts herein demonstrate and I find that Respondent violated Section 8(a)(1) and (5) by withdrawing recognition from the Union.

The Union's 8 April letter requested that Respondent furnish a listing of all unit employees along with information as to each of those employees. That information is necessary for the Union to accomplish its duties as bargaining representative. As an employer, the Respondent has an obligation to provide information that is needed by the bargaining representative for the proper performance of its duties. In view of my other findings herein, it is apparent, and I find that Respondent also violated Section 8(a)(1) and (5) by refusing to supply the Union with the requested information (*Cowles Publishing Co.*, 280 NLRB No. 105 (1986), and cases cited therein).

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed by Respondent at its Plants 1 and 2, Ceramic, Alabama; Plant 3, Dixieland, Alabama; and Plant 4 at Brick Yard, Alabama, including the Sample Department (Ceramic, Alabama), but excluding the Material Handling Division, plant clerical employees, supervisors, office clerical and professional employees as defined in the Act constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. By refusing to sign the agreement designated by Respondent's final offer and agreed to on 8 April 1986, Respondent violated Section 8(a)(5) and (1) of the Act.

5. By withdrawing recognition from the Union as the representative of the employees in the aforementioned bargaining unit, Respondent violated Section 8(a)(5) and (1) of the Act.

6. By failing and refusing to furnish the aforesaid labor organization with the information requested by it on 8 April 1986, regarding employees in the bargaining unit, Respondent violated Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practice are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent engaged in, and is engaging in, certain unfair labor practices, I shall recommend, pursuant to Section 10(c) of the Act, that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

The record is unclear whether Respondent instituted all the added benefits included in its final offer. If nec-

essary, that question may be resolved in compliance proceedings and, if it is determined that Respondent failed to implement all added benefits, the remedy herein shall act to restore the status quo ante in accord with the terms of the agreed to collective-bargaining agreement effective 8 April 1986, as shown in *Turnbull Enterprises, Inc.*, 259 NLRB 934 (1982); and Ogle Protection Service, *Inc.*, 183 NLRB 682 (1970).[2]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[3]

ORDER

Respondent, Bickerstaff Clay Products, Co., Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to execute the collective-bargaining agreement with the Laborers' Local Union No. 246, which was agreed to on 8 April 1986.

(b) Withdrawing recognition on 9 April 1986 and refusing to recognize and bargain with Laborers' Local Union No. 246 as a representative of the following unit:

> All production and maintenance employees employed by Respondent at its Plants 1 and 2, Ceramic, Alabama; Plant 3, Dixieland, Alabama; and Plant 4 at Brick Yard, Alabama, including the Sample Department (Ceramic, Alabama), but excluding the Material Handling Dixision, plant clerical employees, supervisors, office clerical and professional employees as defined in the Act.

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[2] See generally *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Refusing to furnish the aforesaid labor organization with the information requested by it on 8 April 1986.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act.

(a) Execute forthwith the collective-bargaining agreement with the Union which was agreed upon on 8 April 1986.

(b) Implement all the terms of the aforesaid collective-bargaining agreement and, if necessary, restore the status quo ante in accord with the provisons of the section of this Decision entitled "The Remedy."

(c) Upon request, bargain with the aforenamed labor organization as the exclusive representative of all employees in the aforesaid bargaining unit with respect to rates of pay, wages, hours, and other terms and conditions of employment.

(d) Upon request, furnish the above-named labor organization with the information it requested on 8 April 1986.

(e) Post at its offices and places of business copies of the notice attached hereto marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director, for Region 10, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 con-

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[4] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

secutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated at Washington, DC 15 December 1986

/s/ J. Pargen Robertson
J. PARGEN ROBERTSON
Administrative Law Judge

"Appendix"

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.
To organize.
To form, join, or assist any union.
To bargain collectively through representatives of their own choice.
To act together for other mutual aid or protection.
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize Laborers' Local Union No. 246, as the exclusive bargaining representative of our employees in the following described appropriate bargaining unit:

All production and maintenance employees employed by Respondent at its Plants 1 and 2, Ceramic, Alabama; Plant 3, Dixieland, Alabama; and Plant 4 at Brick Yard, Alabama, including the Sample Department (Ceramic, Alabama), but excluding Material Handling Division, plant clerical employees, supervisors, office clerical and professional employees as defined in the Act.

WE WILIL NOT refuse to execute the collective-bargaining agreement with the Union which was agreed upon on 8 April 1986.

WE WILL NOT refuse to furnish the above-named labor organization with information requested by it, by letter on 8 April 1986.

WE WILL, upon request, bargain collectively with the Union as exclusive representative of the employees in the appropriate unit described above regarding wages, hours, and other terms and conditions of employment.

WE WILL execute forthwith the collective-bargaining agreement with the Union which was agreed upon on 8 April 1986.

WE WILL, upon request, furnish the above-named labor organization the information it requested on 8 April 1986.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

BICKERSTAFF CLAY PRODUCTS, INC.
(Employer)

Date: ———————— By: ————————————
(Representative) (Title)

This Is an Official Notice and Must Not Be Defaced By Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 101 Marietta Tower, Suite 2400, 101 Marietta Street, N.W., Atlanta, GA 30323

Telephone: (404) 331-2886